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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VILATH XAYASOMLOTH et al.,

Defendant and Appellant.

D041350; D041352

(Super. Ct. No. SCD161852)

APPEALS from judgments of the Superior Court of San Diego County, David J. Danielsen. Affirmed in part; reversed in part with directions.

A jury convicted defendants Vilath Xayasomloth and Chanesamone Aphayavong of second degree murder in the fatal stabbing of Bounleuth Latvong (Getty).<sup>1</sup> (Pen.

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<sup>1</sup> For clarity, we may refer to individuals by their nicknames used at trial and intend no disrespect.

Code, § 187, subd. (a).)<sup>2</sup> The court found defendants committed the crime for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).)

In these consolidated appeals, Xayasomloth contends his murder conviction should be vacated under the "merger doctrine" of *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*). Xayasomloth also contends there was insufficient evidence to prove he was guilty of murder as an aider and abettor under the "natural and probable consequences" doctrine. Xayasomloth further contends the court erred by (1) admitting expert gang evidence, (2) declining to instruct the jury that voluntary manslaughter, involuntary manslaughter and assault by means of force likely to produce great bodily injury were lesser offenses included in the charged crime of murder, (3) imposing a consecutive determinate term for his section 186.22 criminal street gang enhancement, and (4) instructing the jury with CALJIC No. 2.90.

Aphayavong contends his murder conviction should be reversed because (1) there was insufficient evidence to prove he was guilty of murder as an aider and abettor under the natural and probable consequences doctrine, (2) the court erred by declining to instruct the jury that voluntary manslaughter was a lesser offense included in the charged crime of murder, and (3) his trial counsel rendered ineffective assistance by not requesting jury instructions that voluntary manslaughter and assault by means of force

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<sup>2</sup> All further statutory references are to the Penal Code unless otherwise specified.

likely to produce great bodily injury were lesser offenses included in murder.

Aphayavong also contends the court erred in imposing a consecutive determinate term for his section 186.22 criminal street gang enhancement.

We determine the consecutive 10-year determinate term imposed on each defendant for the gang enhancement under section 186.22 must be reversed and the alternate punishment of 15-year minimum parole eligibility must be imposed. The remainder of the judgments must be affirmed.

## I

### FACTUAL BACKGROUND

We state the facts and reasonable inferences in the light most favorable to the judgments. (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).)

## A

### *The Tiny Oriental Crips Street Gang*

In 1987, Ham Xaysana (Ham), also known as "the General," started the Tiny Oriental Crips (T.O.C.), a predominantly Laotian street gang that claimed San Diego's Linda Vista neighborhood as its territory. By 2000 the San Diego Police Department's gang unit detective (Michael Gallivan) assigned to investigate Southeast Asian gangs identified 104 documented members of the T.O.C. gang. Gallivan learned from T.O.C. gang members that on occasion they carried and used weapons such as knives, handguns, rifles and machine guns. When a T.O.C. gang member was in a fight, other gang members would join in the fight, even if the other side were outnumbered. Fights were

not necessarily against rival gang members, but could also be against civilians. Gang fights were "all about winning," not about being fair. If a gang member did not "back up the set" by helping a fellow gang member during a fight, he would be "disrespected" by other gang members. Gang attacks could result in death.

Ham, Prouneprasith Thirakul (Tho) and Keila were original members of the T.O.C. gang. Older members of the T.O.C. gang, including Ham, Xayasomloth and Aphayavong, were known as Original Gangsters (O.G.'s). Ham's sister Khamla Xaysana (Khamla) founded the "T.O.C. Ladies."

## B

### *The December 2000 Party*

On December 9, 2000, beginning in the late afternoon, Ham and Khamla hosted a party at their parents' home in Linda Vista (the December 2000 party). The party was attended by approximately 20 to 40 people, many of whom were T.O.C. gang members, including Aphayavong and Xayasomloth. Aphayavong arrived at the party with his current girlfriend Thiep, a friend of Khamla. Khamla had seen Aphayavong at T.O.C. gang social events in 1994 and 2000. Khamla had last seen Xayasomloth with T.O.C. gang members at a party in 1999 or 2000.

At the December 2000 party, T.O.C. gang members wore blue clothing and greeted each other with gang signs. Also attending the party were Khamla's friends from outside San Diego. Ultimate victim Getty arrived from Orange County with his nephew Terry Chanthachone (Jerry), Keoudone Chanthavong (John) and Ketmany

Keungmanivong (Ket). Arriving from Temecula shortly afterward were Tayphrasouky Phramany (Mony), Phouangmalay Douangsavanh (Lynda), Phouthasth Chounlamany (Bey) and others.

As guests from out of town arrived and entered the backyard, several individuals, including Xayasomloth, looked at them up and down in a mean way ("maddogging"). Some of the maddogging individuals wore blue clothing and looked like gang members. When entering the party, Mony felt uncomfortable because he was wearing a red shirt and worried that people might think he was part of a rival gang. As Mony's girlfriend Lynda entered the party, some guests looked "weirdly" at her and made her feel she did not belong there.

During the party, Aphayavong and his former girlfriend Khonemala Didyavong (La) were arguing and cursing at each other. La's friends separated them and calmed La down. Getty also stepped in to help break up the argument.

Later, Tho, who was Xayasomloth's friend, began arguing with Tho's ex-girlfriend because she had been flirting with Getty. Eventually, the very drunk, angry and rowdy Tho began throwing bottles and chairs around the backyard. Tho challenged people to fight by motioning with his hands to himself and asking, "Anybody want some of this?" Although Ham tried to calm Tho, Tho wanted to fight Ham. Ham then told the guests the party was over and asked everyone to leave. Tho continued his angry acting and cursing. Tho then asked Getty, "What's up, you got a problem?"

## C

### *The Killing of Getty*

After the abrupt end of the party, people began leaving the house. Mony, Bey and Jerry saw a drunk Getty carrying a large knife when he left the party. Getty walked with John, Ket and Jerry around the side of the party house and headed to John's parked car across the street. The guests from Temecula left at the same time. Meanwhile, Aphayavong was driving his car up and down the street, speeding, squealing the tires and revving the engine. As Getty, John, Ket and Jerry arrived at John's car, Getty was holding and playing around with a knife that had been used at the party to cut meat. Jerry took the knife from Getty and threw it underneath John's car.<sup>3</sup>

When John entered his car and started the engine, Xayasomloth and Tho began walking quickly across the street toward John's car. Xayasomloth and Tho approached Getty and Ket as they stood on the sidewalk to the right of John's car. Xayasomloth asked Getty, "You got shit?" Getty said "No" and "It's cool, it's cool." Getty's hands were empty. As Getty extended his hand to shake Xayasomloth's hand, Xayasomloth "sucker punched" Getty in the face, knocking him to the ground.

After Getty got up from the ground and began running away down the street, Xayasomloth and Tho started chasing him. Aphayavong stopped his car in the middle of

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<sup>3</sup> The knife thrown under John's car was found 170 feet from where Getty was ultimately stabbed. DNA testing did not reveal the presence of human blood on the knife.

the street, emerged from the car, and joined Xayasomloth and Tho in the chase.

Approximately five to 10 other people ran from the party house in pursuit of Getty.

When Getty eventually fell, he was punched and kicked repeatedly by people who had been chasing him. As Mony and his friends approached Getty, several people who had been beating Getty began running back toward the party house. Getty lay bleeding and moaning in the street when his friends arrived to help. Getty had been stabbed 10 times and received several subgaleal hemorrhages over his skull consistent with blunt force trauma. As Getty lay on the ground, Xayasomloth continued to yell at Getty, shouting "Get the fuck up, motherfucker, you want some more?" and "Fuck you, you got a problem, you want some more?"

Tho knelt down and helped Getty. Phatthana Phrakonkham (Nia) was screaming, "Take him to the hospital, take him to the hospital." While in the driveway of the party house, La heard Nia's screams and ran toward her. En route, La saw Tho and Xayasomloth. When asked by La what had happened, Xayasomloth said: "Nothing happened. Get in your car. Let's go, let's go." La then heard Nia say, "Getty got stabbed," and saw Nia on the ground with Getty. Mony and Bey put Getty into their car and drove him to the hospital.

After the attack ended, Aphayavong ran back toward the party house, got into his car that was parked in the street and told his girlfriend Thiep to get him some napkins so he could wipe off some blood. Aphayavong then drove away.

Getty died in the hospital from his stab wounds.

## D

### *Events After Getty's Killing*

On December 10, 2000, after midnight, Xayasomloth arrived at the home he shared with his girlfriend Janette Keovichith (Janette). After receiving a phone call from Aphayavong, Xayasomloth and Janette left their home and went to Keila's home, where they stayed for two or three days. After Xayasomloth and Janette returned home, they were visited by Aphayavong. Aphayavong told Xayasomloth that he "beat the crap" out of Getty and cut his knuckles on Getty's teeth. Aphayavong also said he had asked his girlfriend Thiep for a napkin.

A few days after the party, Ham saw Xayasomloth at Keila's house. Xayasomloth asked Keila for the name of a good lawyer. Xayasomloth also said he needed to get the videotape of the party because it depicted the partygoers. During the conversation, Xayasomloth appeared scared and nervous. When Ham asked Xayasomloth if he had been involved in the murder, Xayasomloth did not respond.

In November 2001 after his arrest for Getty's killing, Aphayavong admitted to a sheriff's deputy that he was a member of the T.O.C. gang.

## II

### SUPERIOR COURT PROCEEDINGS

By amended information, the People charged Xayasomloth and Aphayavong with murdering Getty. (§ 187, subd. (a).) The People also alleged: The murder was committed for the benefit of, at the direction of, and in association with a criminal street

gang (§ 186.22, subd. (b)(1)); Xayasomloth had one prior "strike" conviction (§ 667, subds. (b)-(i)); Aphayavong had served two prior prison terms (§ 667.5, subd. (b)); Aphayavong had been convicted of two serious felonies (§ 667, subd. (a)(1)); and Aphayavong had two prior strike convictions (§ 667, subds. (b)-(i)).

At trial, the prosecution conceded there was no evidence that either Xayasomloth or Aphayavong actually stabbed Getty. The prosecution proceeded on the theory Xayasomloth and Aphayavong were guilty of second degree murder as aiders and abettors because Getty's death was a natural and probable consequence of the "target" crime of assault by means of force likely to produce great bodily injury. (§ 245, subd. (a)(1); *People v. Prettyman* (1996) 14 Cal.4th 248, 254 (*Prettyman*).)

The jury convicted Xayasomloth and Aphayavong of second degree murder. Xayasomloth and Aphayavong waived jury trial on the section 186.22 enhancement allegations and the trial court found the enhancements to be true as to both defendants. Xayasomloth and Aphayavong also admitted the truth of all prior conviction allegations.<sup>4</sup>

The court sentenced Xayasomloth to 40 years to life, consisting of 30 years to life for murder enhanced by a consecutive 10-year term for his section 186.22 criminal street gang enhancement. The court sentenced Aphayavong to 45 years to life, consisting of 30 years to life for murder enhanced by a consecutive 10-year term for his criminal street gang enhancement (*id.*), plus five years for a prior serious felony conviction.

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<sup>4</sup> As such, this appeal does not present any issue under *Blakely v. Washington* (2004) 542 U.S. \_\_\_, [124 S.Ct. 2531; 159 L.Ed. 2d 403.] After we permitted

### III

#### DISCUSSION

##### A

##### *Xayasomloth's Appeal*

###### 1

#### *Ireland's* Merger Doctrine Does Not Apply to Aider and Abettor Culpability Under the Natural and Probable Consequences Doctrine

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator. (§ 31.) [¶] Accomplice liability is 'derivative,' that is, it results from an act by the perpetrator to which the accomplice contributed." (*Prettyman, supra*, 14 Cal.4th at p. 259.) With respect to the "mental state necessary for liability as an aider and abettor" (*ibid.*), the Supreme Court has stated that to prove a defendant was an accomplice, "the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*Ibid.*, citing *People v. Beeman* (1984) 35 Cal.3d 547, 560 (*Beeman*).)

"It sometimes happens that an accomplice assists or encourages a confederate to commit one crime, and the confederate commits another, more serious crime (the nontarget offense). Whether the accomplice may be held responsible for that nontarget

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Aphayavong to file a supplemental opening brief concerning *Blakely*, we granted

offense turns not only upon a consideration of the general principles of accomplice liability set forth in *Beeman*, *supra*, 35 Cal.3d 547, but also upon a consideration of the 'natural and probable consequences' doctrine . . . ." (*Prettyman*, *supra*, 14 Cal.4th at pp. 259-260.) "At common law, a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime, but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*Id.* at p. 260.) "Although the 'natural and probable consequences' doctrine has been 'subjected to substantial criticism' [citations], it is an 'established rule' of American jurisprudence [citation]. It is based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.'" (*Ibid.*)

The Supreme Court has "set forth the principles of the 'natural and probable consequences' doctrine as applied to aiders and abettors: '[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that *a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator.* His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by

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Aphayavong's motion to withdraw his supplemental opening brief.

the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the [charged<sup>5</sup>] offense, which . . . must be found by the jury.'" (*Prettyman, supra*, 14 Cal.4th at p. 261, citing *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, italics added.) "Thus, under *Croy*, a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*Prettyman*, at p. 261.)

"[W]hen a particular aiding and abetting case triggers application of the 'natural and probable consequences' doctrine," the test set forth in *Beeman, supra*, 35 Cal.3d at page 560, "applies, and the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime. But the trier of fact must also find that (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Prettyman, supra*, 14 Cal.4th at p. 262, fn. omitted.)

Where, as here, "the prosecutor relies on the 'natural and probable consequences' doctrine, the trial court must identify and describe the target crimes that the defendant might have assisted or encouraged." (*Prettyman, supra*, 14 Cal.4th at p. 254.) Here, the

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<sup>5</sup> See *People v. McCoy* (2001) 25 Cal.4th 1111, 1118, fn. 1 (*McCoy*).

trial court instructed the jury that the theory of Xayasomloth's culpability as an aider and abettor was premised on the target offense of assault by means of force likely to produce great bodily injury.

Xayasomloth asserts the jury's guilty finding of second degree murder was based on the theory Getty's death was the natural and probable consequence of Xayasomloth's initial assault (the sucker punch) that inflamed other T.O.C. gang members to complete the assault and kill Getty. He argues his conviction must be vacated under the merger doctrine of *Ireland, supra*, 70 Cal.2d 522, a case involving the felony-murder rule.<sup>6</sup>

In articulating the merger doctrine in *Ireland, supra*, 70 Cal.2d 522, the Supreme Court "held that the trial court erred in instructing the jury on second degree felony murder based on the crime of assault with a deadly weapon." (*People v. Robertson* (2004) 34 Cal.4th 156, 169 (*Robertson*).) "The defendant's crime of assault with a deadly weapon *merged* with a resulting homicide and could not form the basis for an application of the second degree felony-murder rule." (*Ibid.*, italics added.) The Supreme Court "concluded that the utilization of the felony-murder rule in [such] circumstances . . . extends the operation of that rule 'beyond any rational function that it is designed to serve.' [Citation.] To allow such use of the felony-murder rule would effectively

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<sup>6</sup> "Under the felony-murder rule, a homicide is murder when it occurs in the course of certain serious and inherently dangerous felonies." (*People v. Rios* (2000) 23 Cal.4th 450, 460, fn. 6 (*Rios*).) "In such cases, the intent to commit a dangerous felony that actually results in death is substituted for malice, thus establishing the extent of culpability appropriate to murder." (*Ibid.*)

preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault — a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (*Ireland*, at p. 539.) Hence, the Supreme Court held that a "second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." (*Ibid.*) The Supreme Court limited application of its enunciated merger doctrine "to the determination of whether a second degree felony-murder instruction is warranted under the evidence." (*Id.* at p. 540, fn. 14.)

Xayasomloth contends the merger doctrine of *Ireland*, *supra*, 70 Cal.2d 522, should be applied here to preclude a finding of second degree murder based on an aider and abettor theory under the natural and probable consequences doctrine because the predicate felony, or target offense, was assault by means of force likely to produce great bodily injury. Asserting *Ireland's* merger doctrine would preclude use of his "uncontested act" as a perpetrator in the initial assault on Getty (the sucker punch) to impute malice aforethought or intent to commit murder under the felony-murder rule, Xayasomloth contends so, too, should the merger doctrine render it improper to impute to him any malice aforethought or intent to commit murder under the natural and probable consequences doctrine where, as here, he was the initial perpetrator of the target assault

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offense. However, Xayasomloth's reliance on *Ireland* is misplaced. Although *Ireland's* merger doctrine governs culpability under the felony-murder rule, the merger doctrine does not apply to aider and abettor culpability under the natural and probable consequences doctrine.

In *People v. Francisco* (1994) 22 Cal.App.4th 1180 (*Francisco*), the appellate court rejected a contention that "allowing the theory of aiding and abetting of an assault with a firearm to be the basis for a finding of murder violates the *Ireland* principles." (*Francisco*, at p. 1189.) The appellate court observed that in *Ireland, supra*, 70 Cal.2d 522, "the Supreme Court held that a felony-murder theory cannot be based on a felony which is an integral part of the homicide because such a theory would preclude the jury from considering malice aforethought in all cases wherein the homicide has been committed as a result of a felonious assault. [Citation.] [¶] However, aiding and abetting is one means under which derivative liability for the commission of a criminal offense is imposed. It is not a separate criminal offense. [Citation.] As an aider and abettor, it is the intention to further the acts of another which creates criminal liability. The "'natural and probable consequences'" standard under CALJIC No. 3.02 which allows a finder of fact to render a verdict on derivative aider and abettor liability, *presents an 'all-encompassing standard for proper lay application of law to relevant evidence on the issue of legal causation of a criminal act.'* [Citation.] If the principal's criminal act which is charged to the aider and abettor is a reasonably foreseeable consequence to any criminal act of that principal, and is knowingly aided and abetted, then the aider and

abettor of such criminal act is derivatively liable for the act charged. [Citation.] For this reason, the logical and legal impediments to criminal liability as found in *Ireland* are not applicable and do not have persuasive value with respect to limiting an aider and abettor's liability." (*Id.* at p. 1190, italics added.)

Xayasomloth contends *Francisco*, *supra*, 22 Cal.App.4th 1180, is distinguishable because unlike the facts in that case, his act as the *perpetrator* in the initial assault on Getty (the sucker punch) became the basis for his liability as an aider and abettor. Xayasomloth contends his act as a perpetrator of the target assault offense was impermissibly used as "the initial domino in the natural and probable consequences theory that was the basis for his liability." However, contrary to Xayasomloth's contention, the fact he was the initial perpetrator of the target offense did not preclude his culpability as an aider and abettor in Getty's murder. (*McCoy*, *supra*, 25 Cal.4th at pp. 1116-1117, 1120.)

In *McCoy*, *supra*, 25 Cal.4th 1111, the Supreme Court observed that all "persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." [Citations.] Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. [Citation.] Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as 'vicarious.' [Citation.] This description is accurate as far as it goes. But . . . the aider and abettor's guilt for the intended crime is not entirely vicarious.

Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state. [¶] It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, *even if unintended*, if it is a natural and probable consequence of the intended assault." (*Id.* at pp. 1116-1117, italics added.) Further, two participants can be "direct perpetrators as well as aiders and abettors of the other. The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. *It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.*" (*Id.* at p. 1120, italics added.)<sup>7</sup>

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<sup>7</sup> Moreover, in *McCoy, supra*, 25 Cal.4th 1111, the Supreme Court faced the question "whether an aider and abettor may be guilty of greater homicide-related offenses than those the actual perpetrator committed." (*Id.* at p. 1114.) The Supreme Court concluded: "Because defenses or extenuating circumstances may exist that are personal to the actual perpetrator and do not apply to the aider and abettor, the answer, sometimes, is yes." (*Ibid.*) Thus, the Supreme Court observed: "The statement that an aider and abettor may not be guilty of a greater offense than the direct perpetrator, although sometimes true in individual cases, is not universally correct. Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual

Other case law has also rejected contentions substantially similar to (1) Xayasomloth's claim that the merger doctrine of *Ireland, supra*, 70 Cal.2d 522, should apply here and (2) his ancillary constitutional challenge to jury instructions on the legal theory of guilt discussed *infra*. In *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*), the appellate court observed that to convict a defendant of aiding and abetting a murder, it is not necessary to establish the defendant had the specific intent to kill. (*Id.* at pp. 1379-1380; accord, *Francisco, supra*, 22 Cal.App.4th at p. 1190.) Instead, "*the specific intent necessary for conviction of an aider and abettor in a murder would not be the specific intent to kill, but the intent to 'encourage and bring about conduct that is criminal.'*" The failure to draw this critical distinction . . . has been at the bottom of a great deal of misunderstanding in cases such as this." (*Olguin*, at p. 1379, italics added.)

In *People v. Culuko* (2000) 78 Cal.App.4th 307 (*Culuko*), the appellate court observed: "Under the natural and probable consequences doctrine, "" . . . the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable consequences of any act that he knowingly aided or encouraged.""

[Citations.] [¶] *The natural and probable consequences doctrine operates independently of the second degree felony-murder rule.* It allows an aider and abettor to be convicted of murder, *without malice*, even where the target offense is not an inherently dangerous

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perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Id.* at p. 1120.)

felony." (*Id.* at p. 322, italics added.) Further, the "Supreme Court has repeatedly rejected the contention that an instruction on the natural and probable consequences doctrine is erroneous because it permits an aider and abettor to be found guilty of murder *without malice*." (*Ibid.*, italics added, citing *People v. Garrison* (1989) 47 Cal.3d 746, 777-778; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1231-1232.) "'The mens rea of an accomplice is 'not designed to ensure that his conduct constitutes the offense with which he is charged. His liability is vicarious.'"" (*Culuko*, at pp. 322-323.) In sum, Xayasomloth has not established that the merger doctrine articulated in *Ireland*, *supra*, 70 Cal.2d 522, should apply here to compel reversal of his conviction for second degree murder as an aider and abettor under the natural and probable consequences doctrine.<sup>8</sup>

Xayasomloth further contends the jury instructions bearing on the legal theory of guilt (particularly CALJIC No. 3.02) violated the Fifth, Sixth and Fourteenth Amendments to the federal constitution because the People's aider and abettor theory under the natural and probable consequences doctrine relieved the prosecution from

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<sup>8</sup> "Commentators have observed that the two complicity rules (that governing felony murder and that governing aiding and abetting generally) involve similar imputations of conduct and culpability [citation] and may be seen as general and specific aspects of the same problem — 'the problem of the responsibility of one criminal . . . for the conduct of a fellow-criminal . . . *who, in the process of committing or attempting the agreed-upon crime, commits another crime*' [citation]. The language used to define the scope of the two rules also is linked historically in California law. [Citations.] Nevertheless, complicity appears broader under the felony-murder rule than under the natural and probable consequences doctrine, which we have described as resting on foreseeability [citation], in that a felon may be held responsible for a killing by his or her cofelon, under the felony-murder rule, even if the killing was not foreseeable to the nonkiller because 'the plan as conceived did not contemplate the use or even the carrying of a weapon or

having to prove (1) any intent to commit murder or (2) the requisite malice aforethought for second degree murder.<sup>9</sup> In *Francisco, supra*, 22 Cal.App.4th 1180, in rejecting a contention that CALJIC No. 3.02 meant a defendant "could be found guilty without a finding that he shared the perpetrator's intent to kill," the appellate court noted "this is not

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other dangerous instrument.'" (*People v. Cavitt* (2004) 33 Cal.4th 187, 212, fn. 2 (conc. opn. of Werdegar, J.), italics added.)

<sup>9</sup> The trial court instructed the jury on the natural and probable consequences doctrine with a modified version of CALJIC No. 3.02 that provided:

"One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted.

"In order to find the defendant guilty of the crime of Murder, as charged in Count 1, you must be satisfied beyond a reasonable doubt that:

"1. The crime of Assault with force likely to produce great bodily injury was committed;

"2. That the defendant aided and abetted that crime;

"3. That a co-principal in that crime committed the crime of Assault with force likely to produce great bodily injury; and

"4. The crime of Murder was a natural and probable consequence of the commission of the crime of Assault with force likely to produce great bodily injury.

"You are required to unanimously agree as to the identified target crime the defendant aided and abetted. You must be satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of the identified and defined target crime, and you must be satisfied beyond a reasonable doubt and unanimously agree that the crime of Murder was a natural and probable consequence of the commission of that target crime.

"Whether a consequence is 'natural and probable' is an objective test based not on what the defendant actually intended but on what a person of reasonable and ordinary prudence would have expected would be likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural consequence' is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

The court also instructed the jury concerning principals in crimes, aiding and abetting, murder, second degree murder, and assault by means of force likely to produce great bodily injury.

the test for aider and abettor liability. Such liability is a question of legal causation which is independent of any intent that the result in question occurred. [Citation.] Thus, the ultimate factual question is whether the perpetrator's criminal act, upon which the aider and abettor's derivative criminal liability is based, was "'reasonably foreseeable'" or the probable and natural consequence of a criminal act encouraged or facilitated by the aider and abettor." (*Francisco*, at p. 1190.) Considering that an aider and abettor may be found guilty of murder without malice or the intent to kill, we reject as meritless Xayasomloth's contentions that the jury instructions bearing on the legal theory of guilt were unconstitutional as (1) permitting the jury to convict him for second degree murder without a finding that the essential element of malice aforethought was established beyond a reasonable doubt and (2) not requiring that the jury determine whether he had any intent that Getty be killed but instead simply whether under an objective test a person of reasonable and ordinary prudence would have expected that Getty's death was likely to occur. (*Culuko*, *supra*, 78 Cal.App.4th at pp. 322-323; *Olguin*, *supra*, 31 Cal.App.4th at pp. 1379-1380; *Francisco*, at p. 1190.)

## 2

### Substantial Evidence Supported Xayasomloth's Murder Conviction as an Aider and Abettor Under the Natural and Probable Consequences Doctrine

The prosecution pursued a second degree murder conviction against Xayasomloth on the theory he aided and abetted an assault by means of force likely to result in great bodily injury, the target crime of which second degree murder was the natural and probable consequence. Asserting there was no proof his actions were motivated by gang

animus or affiliation, Xayasomloth contends there was insufficient evidence to prove he was guilty of murder as an aider and abettor under the natural and probable consequences doctrine. In particular, Xayasomloth contends there was no evidence establishing accomplice liability, planning or motive.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Bolin, supra*, 18 Cal.4th at p. 331.) We do not reweigh the evidence, resolve conflicts in the evidence or reevaluate the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) The test on appeal is not whether we believe the evidence established the defendant's guilt beyond a reasonable doubt, but whether ""any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."" (*People v. Kelly* (1990) 51 Cal.3d 931, 956 (*Kelly*).)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164 (*Cooper*); accord, *Prettyman, supra*, 14 Cal.4th at p. 259.) ""The logical basis for conviction as an aider and abettor is that with knowledge of the unlawfulness of the act, one renders some independent contribution to the

commission of the crime or otherwise makes it more probable that the crime will be successfully completed than would [be] the case absent such participation.'" (*People v. Brady* (1987) 190 Cal.App.3d 124, 132, criticized on another point in *People v. Montoya* (1994) 7 Cal.4th 1027, 1045 (*Montoya*).) The test for aider or abettor culpability is "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.) An aider and abettor's intent may be proven circumstantially from his volitional acts with knowledge of their probable consequences. (*Beeman, supra*, 35 Cal.3d at pp. 559-560.) "'The presence of one at the commission of a felony by another is evidence to be considered in determining whether or not he was guilty of aiding and abetting; and it has also been held that presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.'" (*People v. Moore* (1953) 120 Cal.App.2d 303, 306 (*Moore*); accord, *People v. Gonzales* (1970) 4 Cal.App.3d 593, 600, disapproved on another point in *People v. Alvarez* (1996) 14 Cal.4th 155, 219, fn. 23.)

As discussed, an aider and abettor is guilty not only of the crime originally intended by the perpetrator, but also of any other offense that is a "natural and probable consequence" of the crime aided and abetted. (*Prettyman, supra*, 14 Cal.4th at p. 260.) Thus, a "person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not

whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133 (*Mendoza*), citing *Prettyman*, at pp. 260-262; see *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11.) Where, as here, "a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*McCoy, supra*, 25 Cal.4th at p. 1117.)

The question whether a particular offense is a natural and probable consequence of the intended target crime is a question of fact for the jury. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) In "decisions involving application of the 'natural and probable consequences' doctrine in aiding and abetting situations" where, as here, "a defendant assisted or encouraged a confederate to commit an assault with a deadly weapon or with potentially deadly force, and the confederate not only assaulted but also murdered the victim," courts have generally "had no difficulty in upholding a murder conviction, reasoning that the jury could reasonably conclude that the killing of the victim . . . was a 'natural and probable consequence' of the assault that the defendant aided and abetted." (*Prettyman, supra*, 14 Cal.4th at p. 262.)

Considering those legal principles, we conclude substantial evidence supported Xayasomloth's conviction for second degree murder as an aider and abettor under the natural and probable consequences doctrine. There is more than adequate evidence from which the jury could have found that (1) Xayasomloth was a member of the T.O.C. gang;

(2) Getty's murder was the natural and probable consequence of a "rat-pack" attack by knife wielding T.O.C. gang members; and (3) the attack was caused by the initial sucker punch landed on Getty by one of the gang's members, Xayasomloth. Getty was killed outside a few minutes after the end of a party at the home of the parents of Ham, the founder of the T.O.C. gang. Numerous members of the T.O.C. gang were at the party. Detective Gallivan of the gang unit of the San Diego Police Department estimated approximately 25 documented members of the T.O.C. gang were present.

Ample evidence, including Detective Gallivan's expert testimony, showed Xayasomloth was a member of the T.O.C. gang at the time of the December 2000 party. Indeed, Xayasomloth's attendance at the party indicated he had not removed himself from the T.O.C. gang. Further, Khamla had seen Xayasomloth at a party with T.O.C. gang members in 1999 or earlier in 2000. Moreover, Ham "the General" testified that Xayasomloth was a member of the T.O.C. gang, in order to leave the gang a member would have to be "jumped out," and no member had ever left the gang.

As guests from out of town arrived at the December 2000 party and entered the backyard, they were maddogged by Xayasomloth and other persons who appeared to be gang members. When Getty's friends entered the party, they felt uncomfortable and "weird" because of looks they received from the gang members.

After Ham terminated the party because of Tho's rowdy and belligerent behavior, Xayasomloth and Tho approached Getty on a nearby sidewalk. Heated words were exchanged. As Getty attempted to shake Xayasomloth's hand, without warning he was

sucker punched in the face by Xayasomloth and knocked to the ground. When Getty got up and began running away, Xayasomloth and Tho chased him. Once the chase began, approximately five to 10 partygoers joined Xayasomloth and Tho in the chase, and Getty was caught, beaten and eventually stabbed to death. As Getty lay dying in the street, Xayasomloth yelled, "Get the fuck up, motherfucker, you want some more?" and "Fuck you, you got a problem, you want some more?"

Xayasomloth's initial sucker punch and subsequent chase of Getty in the presence of other gang members contributed to other gang members joining in the chase, the beating and the stabbing that ensued. To establish Xayasomloth's culpability for murder as an aider and abettor under the natural and probable consequences doctrine, the prosecution was not required to show Xayasomloth knew that an unidentified fellow gang member intended to use a knife but instead simply that it was reasonably foreseeable a knife would be used to commit a crime other than his intended act of participating and assisting in the gang assault (the "rat-pack takedown") against Getty.<sup>10</sup>

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<sup>10</sup> *People v. Butts* (1965) 236 Cal.App.2d 817, relied upon by Xayasomloth, is unpersuasive. As the appellate court stated in *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056: "To the extent *Butts* requires one accused of aiding and abetting to know of and encourage the perpetrator's intended use of a weapon, it is out of step with Supreme Court authority. (*People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5 (*Godinez*).) 'The only requirement is that defendant share the intent to facilitate the target criminal act and that the crime committed be a foreseeable consequence of the target act. [Citation.]' [Citation.] [¶] *Butts* is also more than three decades old, a remnant of a different social era, when street fighters commonly relied on fists alone to settle disputes. Unfortunately, as this case illustrates, the nature of modern gang warfare is quite different."

While *Montes* was a case involving a clash of rival gangs, the testimony here was that T.O.C. gang fights involved not only rival gangs, but also civilians. We find

(*Mendoza, supra*, 18 Cal.4th at p. 1133; *Prettyman, supra*, 14 Cal.4th at pp. 260-262; *People v. Gonzales, supra*, 87 Cal.App.4th at pp. 10-11.)

It was reasonably foreseeable that Xayasomloth's actions would cause other gang members to join in the attack and kill Getty intentionally in gang fashion. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1465 (*Laster*).) Evidence indicated that when a T.O.C. gang member became involved in a fight, other gang members would join in the fight even where, as here, the other side was outnumbered. A gang member who did not back up the set by aiding his fellow gang member during a fight would be disrespected by other gang members. Gang fights were "all about winning," not about being fair. Further, evidence that T.O.C. gang members were known to carry and use weapons on occasion suggested it was reasonably foreseeable that one of the gang members attacking Getty would use a weapon to kill him. By knocking Getty to the ground with a sucker punch and, after Getty got up and tried to flee, chasing Getty down in the presence of other gang members, Xayasomloth knowingly manifested his intent to commit, encourage and facilitate the identified target offense.

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persuasive *Montes's* rationale that given the great potential for escalating violence in gang confrontations, it matters not whether Xayasomloth specifically knew his fellow gang members attacking Getty had knives and would use them in the attack. (See also *Godinez, supra*, 2 Cal.App.4th at p. 501, fn. 5 ["although evidence indicating whether the defendant did or did not know a weapon was present provides grist for argument to the jury on the issue of foreseeability of a homicide, it is not a necessary prerequisite"]; *People v. Montano* (1979) 96 Cal.App.3d 221, 227 [defendant's liability for aiding and abetting an attempted murder does not depend on his awareness that fellow gang members had deadly weapons in their possession].)

Contrary to Xayasomloth's contention, there was no requirement to demonstrate the existence of a prior plan. While evidence of planning activity and an agreement among the participants might have supported a finding of aiding and abetting, it was not necessary. (See *People v. Durham* (1969) 70 Cal.2d 171, 180-181 [distinguishing conspiracy from aiding and abetting culpability].) Instead, the intent to aid and abet may be formed during the commission of the offense by the perpetrator. (*Montoya, supra*, 7 Cal.4th at pp. 1044-1045 [if "an individual happens upon a scene in which a perpetrator unlawfully has entered [a structure] with intent to commit a felony or theft, and, upon learning of that circumstance, forms the intent to facilitate the perpetrator's illegal purpose in entering, that individual incurs the liability of an aider and abettor, commensurate with the liability of the perpetrator"].)

That Xayasomloth may have believed the actual perpetrator of the stabbing was assaulting Getty rather than engaging in murder would not negate Xayasomloth's accomplice liability. Xayasomloth's culpability for the charged crime of murder as an aider and abettor under the natural and probable consequences doctrine was not limited to the commission of the particular act he intended to encourage or facilitate (the target offense of assault by means of force likely to produce great bodily injury), but also extended to other reasonably foreseeable crimes actually committed by the perpetrator, namely, crimes that were natural and probable consequences of the target offense Xayasomloth aided and abetted. (*Prettyman, supra*, 14 Cal.4th at p. 260.) The question was "whether it was reasonably foreseeable that the perpetrator harbored an intent to

kill." (*Laster, supra*, 52 Cal.App.4th at p. 1465.) Under the circumstances, the charged murder of Getty was a natural and probable consequence of the target assault Xayasomloth committed, facilitated and perpetuated.

Further, Xayasomloth's conduct after Getty's stabbing showed Xayasomloth's consciousness of guilt. (*People v. Turner* (1990) 50 Cal.3d 668, 694, fn. 10 (*Turner*).) Xayasomloth fled the crime scene immediately after telling La, "Nothing happened. Get in your car. Let's go, let's go." Then, instead of staying at his own home, Xayasomloth stayed for two to three days with Keila, one of the original members of the T.O.C. gang. Moreover, in the presence of Keila and Ham, Xayasomloth asked for the videotape because it showed the partygoers.

In sum, based on substantial evidence, the jury properly determined the fatal stabbing of Getty was a natural and probable consequence of Xayasomloth's actions because it was reasonably foreseeable that when Xayasomloth sucker punched Getty and chased him down in the presence of other gang members, other gang members would join in the chase, assault Getty by rat-pack takedown, and ultimately kill him. Accordingly, Xayasomloth's conviction for second degree murder as an aider and abettor under the natural and probable consequences doctrine was amply supported by the evidentiary record.

### The Trial Court Properly Admitted Evidence of Xayasomloth's Gang Affiliation and the Dynamics of the T.O.C. Gang

The amended information charged Xayasomloth with murdering Getty for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Asserting evidence of his gang affiliation constituted improper character evidence, Xayasomloth moved in limine to exclude gang affiliation evidence and bifurcate the section 186.22 criminal street gang enhancement allegation. In opposing Xayasomloth's motion, the prosecution stated it intended to introduce gang evidence to show Xayasomloth's motive, intent, and aiding and abetting culpability under the natural and probable consequences doctrine.

In admitting gang affiliation evidence over Xayasomloth's objection, the trial court stated: "I think the evidence comes in on the issue of motive and intent, and that would be in the form of gang membership, identifying members as members of the gang, and then the expert testimony, to talk about the behavior of gangs and sociology of the gangs, in terms of responding to a circumstance similar to this, that is, similar to that evidence." The court also stated the gang affiliation evidence was relevant to explain why the situation went from "zero to jihad in a second." The court bifurcated the section 186.22 criminal street gang enhancement allegation and limited the admission of gang affiliation evidence in the first part of trial to explain the "rat pack takedown" by the group of gang members who assaulted and killed Getty.

Xayasomloth also sought to exclude gang expert Detective Gallivan's opinion testimony about the nature, culture and dynamics of the T.O.C. gang on the ground the

entirety of Gallivan's opinion as it bore on Xayasomloth was based on hearsay. At a foundational hearing under Evidence Code section 402, Gallivan testified: (1) A person is considered to be a gang member if he fits at least three of the five criteria used by San Diego police to determine gang membership; (2) Gallivan never had any contact with Xayasomloth until the investigation of Getty's killing; (3) although Xayasomloth was not a documented T.O.C. gang member and had not discussed gang affiliation with Gallivan, Gallivan believed Xayasomloth was a T.O.C. gang member based on prior contacts involving T.O.C. gang members and Xayasomloth's prior affiliation with the Oriental Killer Boys (O.K.B.) or the 40th Street Crips; (4) despite the lapse of more than five years between Xayasomloth's last known gang activity and Getty's killing, Gallivan opined Xayasomloth was still affiliated with the T.O.C. gang; and (5) Gallivan believed Getty's killing was gang related because if one gang member became involved in a fight, other gang members were compelled to join. The court permitted Gallivan to testify at trial.

At trial, Detective Gallivan testified about the workings of gangs, including the T.O.C. gang. Xayasomloth contends admission of gang evidence was erroneous on various grounds. However, as we shall explain, Xayasomloth has not established any reversible judicial error with respect to admission of such evidence.

(a)

*Detective Gallivan's Trial Testimony*

Detective Gallivan worked in the gang unit of the San Diego Police Department and was assigned to investigate Southeast Asian gangs. Gallivan had undergone course work and training about Asian gangs, and had investigated several hundred gang cases. The San Diego police used five criteria to document gang members, namely, (1) admission of gang membership; (2) clothing, tattoos or other insignia; (3) association with other documented gang members; (4) arrest in a crime committed by gang members; and (5) reliable information concerning gang membership. A person was documented as a gang member if three of those categories applied. Documentation as a gang member occurred only once, and there was a "washout" if a person had no gang contacts for a period of five years.

In 1987 Ham started the T.O.C. gang. Beginning in June 1993, Gallivan monitored and documented the T.O.C. gang, which claimed Linda Vista as its territory and had 104 documented members. A person could become a gang member by fighting other gang members ("jumping into the gang"), but an individual who had already proven himself was allowed to join the gang without being "jumped in." Gallivan spoke to more than 50 T.O.C. gang members about their gang philosophy, rivals, alliances, territories, crimes committed, and way of life. Gang members told Gallivan that on occasion they carried and used weapons such as knives, handguns, rifles and machine guns. Based on

his investigation, Gallivan estimated approximately 25 documented members of the T.O.C. gang were at the December 2000 party.

Before Getty's murder, Gallivan had not personally met Xayasomloth. Gallivan became aware of Xayasomloth after interviewing witnesses who indicated Xayasomloth was a T.O.C. gang member. Gallivan reviewed field interview reports indicating Xayasomloth had been contacted with other T.O.C. gang members at locations where T.O.C. gang members congregated. Xayasomloth's appearance at the December 2000 party indicated he had not removed himself from the T.O.C. gang. Gallivan opined that Xayasomloth was a T.O.C. gang member at the time of that party.

Gang culture thrived on violence. Respect was very important in any gang, including the T.O.C. gang. The most common way of showing respect was to join in a fight started by another gang member (backing up the set). When a T.O.C. gang member became involved in a fight, other gang members would join in the fight even if the other side were outnumbered. Gang fights were "all about winning" and not about being fair. A gang member who did not back up the set by aiding a fellow gang member during the fight would be disrespected by other gang members. Gang attacks could result in death. Fights were not necessarily against rival gang members but could also be against "civilians." Gallivan opined that if a person from out of town attended a party where there were more than 20 San Diego Asian "Crip" gang members and that person was punched, knocked down and chased by the local gang members, it would be expected

that other local gang members would join in the chase and assist in detaining and subsequently assaulting or beating the person from out of town.

(b)

*Gang Evidence Was Admissible Under Evidence Code Section 1101*

Although evidence of gang affiliation is not inadmissible per se (*People v. Perez* (1981) 114 Cal.App.3d 470, 477), California law has long acknowledged the inflammatory and potentially prejudicial effect of gang affiliation evidence. (*People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497.) Thus, gang affiliation evidence is inadmissible to demonstrate an individual has a predisposition or propensity to commit crimes. (Evid. Code, § 1101, subd. (a);<sup>11</sup> *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240 (*Ruiz*)). Further, gang affiliation evidence is generally not admissible if the particular crime is not otherwise gang related. (See *People v. Cox* (1991) 53 Cal.3d 618, 660.) However, gang affiliation evidence has been admitted where, as here, "the very reason for the crime, usually murder, is gang related." (*Maestas*, at p. 1497.) Gang affiliation evidence may also be admissible where, as here, it is relevant to noncharacter issues such as the defendant's motive or intent. (Evid. Code, § 1101, subd. (b);<sup>12</sup> *People v. Funes*

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<sup>11</sup> Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

<sup>12</sup> Evidence Code section 1101, subdivision (b) provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or

(1994) 23 Cal.App.4th 1506, 1518 (*Funes*.) Indeed, it is well settled that evidence about gang sociology and gang affiliation is admissible if the crime was gang related and the evidence is relevant to establish the defendant's motive or intent. (*Maestas*, at p. 1497; see *People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1240, disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *Olguin*, *supra*, 31 Cal.App.4th at p. 1369; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194-195.) Moreover, because gang membership, activities, dynamics and motivations are beyond the common experience and knowledge of jurors, gang evidence is a proper subject for expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617 (*Gardeley*); *People v. Champion* (1995) 9 Cal.4th 879, 919-922 (*Champion*), disapproved on another point in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2 (conc. opn. of George, C.J., joined by a majority of the court); *People v. Valdez* (1997) 58 Cal.App.4th 494 (*Valdez*); *Olguin*, at p. 1370; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966 (*Gamez*), disapproved on another point in *Gardeley*, at p. 624, fn. 10; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904-905 (*McDaniels*.)

Xayasomloth contends the trial court erred in admitting evidence of his gang affiliation under Evidence Code section 1101, subdivision (b) to show his intent and motive. Xayasomloth contends such evidence did not meet the foundational

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other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act."

requirements for admission of "other act" evidence under that statute. In particular, Xayasomloth contends evidence of his gang affiliation did not concern "other acts" but instead simply constituted an impermissibly remote indicator of his affiliation or membership in the T.O.C. gang or an allied gang at a time more than five years before Getty's killing. Xayasomloth also contends those "other acts" had no similarity to the events at issue at trial but simply indicated he had been stopped by police for being in the company of members of gangs other than the T.O.C. gang. Further, Xayasomloth contends evidence of his gang affiliation was inadmissible as irrelevant because there was no showing of a causal connection between his affiliation with a specific group/gang and his motive or intent to aid and abet the target crime. (Evid. Code, § 350.) Moreover, Xayasomloth contends the probative value of the gang affiliation evidence was weak while the evidence's prejudicial effect was great because it provided the basis for Gallivan's assertedly highly speculative and inflammatory expert opinion on the ultimate issue of intent. However, we reject Xayasomloth's claims and determine that the trial court properly admitted the challenged gang evidence.

Evidence of Xayasomloth's gang affiliation and the workings of the T.O.C. gang was relevant to explain the intent and motive for Getty's killing. (Evid. Code, § 1101, subd. (b); *People v. Williams* (1997) 16 Cal.4th 153, 197 (*Williams*) [motive and intent] (*Williams*); *Funes, supra*, 23 Cal.App.4th at p. 1519 [intent].) Particularly relevant to show the motive and intent of the participants in the chase, beating and killing of Getty was evidence indicating that respect was of great importance to gang members; once a

gang member initiated an assault against another person, it was expected that other gang members would participate in the assault on the victim; and gang members who did not participate in the fight would be disrespected by fellow gang members. Further, evidence that members of the gang commonly carried and used weapons tended to show Getty's death was foreseeable. Thus, the challenged gang evidence was relevant to establish Xayasomloth's culpability for Getty's murder as an aider and abettor by explaining how Getty's death was a foreseeable natural and probable consequence of the felonious rat-pack gang group assault on Getty — an assault Xayasomloth aided and abetted. Such evidence raised reasonable inferences that Xayasomloth initiated the fight against Getty with full knowledge of the foreseeable consequences.

Moreover, given that approximately 25 documented T.O.C. gang members attended the party that ended immediately preceding Getty's killing, evidence of Xayasomloth's gang affiliation and the gang's culture was relevant to explain the impetus for Xayasomloth's sucker punch against Getty, Xayasomloth's subsequent chase of the fleeing Getty in the presence of other gang members and the ultimate gang group assault on Getty that resulted in his death. Excluding such evidence of the gang members' involvement in the charged crime could have left the jury confused about the reasons for Xayasomloth's actions.

Contrary to Xayasomloth's contention, evidence of his gang affiliation was neither too remote nor too dissimilar to the charged crime of murder. Although police had not stopped Xayasomloth for a field interview within the past five years, Xayasomloth was at

the December 2000 party with approximately 25 other T.O.C. gang members at the home of the parents of the gang's founder, Ham. Percipient witness Khamla saw Xayasomloth at a party with T.O.C. gang members in 1999 or earlier in 2000. According to Ham "the General," Xayasomloth was a T.O.C. gang member and no member had ever left that gang.

In sum, Xayasomloth has not shown the trial court erred by admitting the challenged evidence of Xayasomloth's gang affiliation and the T.O.C. gang's culture over Xayasomloth's objection under Evidence Code section 1101, subdivision (b).

(c)

*The Gang Evidence's Probative Value Was Not Outweighed by Its Prejudicial Effect*

Even if relevant, evidence of gang affiliation is subject to exclusion under Evidence Code section 352 if its probative value is substantially outweighed by its prejudicial effect. (*People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) Xayasomloth contends the trial court should have excluded the gang affiliation evidence because any minimal probative value of the evidence was assertedly outweighed by its highly prejudicial effect of "uniquely" tending to "evoke an emotional bias" against him "without regard to its relevance on material issues." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 650 (*Killebrew*); *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) More specifically, Xayasomloth contends the effect of the gang affiliation evidence was to provide the basis for Detective Gallivan's "speculative and inflammatory opinion" that

Xayasomloth's actions were "part of the general culture of gang violence intended to enhance the reputation of the gang."

We review for abuse of discretion the trial court's decision under Evidence Code section 352 to admit the gang affiliation evidence. (*Funes, supra*, 23 Cal.App.4th at p. 1519.) Because the probative value of the gang affiliation evidence was not outweighed by the possibility of prejudice to Xayasomloth, we determine the court acted within its discretion in admitting that evidence. The exclusion of evidence as unduly prejudicial under Evidence Code section 352 "is designed for situations in which evidence of little evidentiary impact evokes an emotional bias." (*Olguin, supra*, 31 Cal.App.4th at p. 1369; *People v. Wright* (1985) 39 Cal.3d 576, 585.) This is not such a case. As discussed, evidence of Xayasomloth's gang affiliation had significant probative value and was necessary to an understanding of the events that occurred. As committed while gang members were attacking him, Getty's killing was gang related. The challenged gang affiliation evidence explained why Xayasomloth participated in a group assault on a victim he did not know, and showed Getty's killing was a foreseeable natural and probable consequence of the target assault crime.

Because the evidence of Xayasomloth's gang affiliation and the T.O.C. gang's culture was relevant to Xayasomloth's mental state and motive, as well as to the issue of whether Getty's murder was a natural and probable consequence of the target crime, the trial court properly concluded any prejudice resulting from admission of such evidence did not substantially outweigh the challenged evidence's highly probative value.

Accordingly, Xayasomloth has not shown the trial court erred by admitting the evidence over Xayasomloth's objection under Evidence Code section 352. (*Ruiz, supra*, 62 Cal.App.4th at pp. 242-243; *Olguin, supra*, 31 Cal.App.4th at pp. 1369-1370; *Funes, supra*, 23 Cal.App.4th at p. 1519.)

(d)

*Gallivan's Expert Opinion Testimony Had an Adequate Foundation*

Xayasomloth contends the trial court should have excluded the evidence of Detective Gallivan's expert opinion concerning the structure, operations and motivations of gangs because it was impermissibly based on inadmissible hearsay. Xayasomloth also contends matters considered by Gallivan to explain gang activity could not properly provide the basis for an expert opinion because those matters were unreliable. (*Killebrew, supra*, 103 Cal.App.4th at pp. 658-659.) Noting that Gallivan admitted he had no personal knowledge that Xayasomloth was a gang member until the investigation in this case, Xayasomloth contends Gallivan's opinion testimony about the T.O.C. gang and Xayasomloth's gang affiliation was based on data that did not satisfy the threshold requirement that expert opinions be based on the type of material upon which experts would normally rely. In particular, Xayasomloth contends (1) Gallivan did not know whether the data he used to describe the T.O.C. gang's activities, such as graffiti, were current; and (2) none of the data indicated Xayasomloth participated in those gang activities or otherwise reflected he was a gang member.

"Admissible expert opinion must be based on matter that reasonably may be relied upon by an expert in forming an opinion on the subject to which his opinion relates. (Evid. Code, § 801.)" (*Williams, supra*, 16 Cal.4th at p. 195.) "Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinion. [Citations.] Of course, any material that forms the basis of an expert's opinion testimony must be reliable." (*Gardeley, supra*, 14 Cal.4th at p. 618.) The "decision of a trial court to admit expert testimony will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*People v. Roberts* (1992) 2 Cal.4th 271, 298.) Xayasomloth has not demonstrated any such abuse of discretion.

At the foundational hearing under Evidence Code section 402, gang expert Gallivan testified about the basis for his opinions. As a detective in the San Diego Police Department's gang unit, Gallivan was specifically assigned to investigate Southeast Asian gangs. Gallivan had extensive training and experience regarding gangs. Gallivan had detailed knowledge of Asian gangs, including the T.O.C. gang. In monitoring and documenting the T.O.C. gang since June 1993, Gallivan spoke to more than 50 T.O.C. gang members about their gang philosophy, rivals, alliances, territory, crimes committed and way of life. Gallivan was also familiar with the "code of conduct" involving fighting within the gang culture.

Based upon foundational evidence of (1) Gallivan's special knowledge, experience, training and education related to gangs, and (2) the reliability of the material

forming the basis for Gallivan's opinion, the court permitted Gallivan to testify as a gang expert at trial. (Evid. Code, §§ 720, 801, subd. (b); *Williams, supra*, 16 Cal.4th at p. 195; *Killebrew, supra*, 103 Cal.App.4th at p. 651; *Olguin, supra*, 31 Cal.App.4th at pp. 1370-1371.) Further, Gallivan's evidence about gang culture, habits and psychology was a proper subject for expert opinion testimony. (*Valdez, supra*, 58 Cal.App.4th 494; accord, *Gardeley, supra*, 14 Cal.4th at p. 617; *Champion, supra*, 9 Cal.4th at pp. 919-922; *Olguin*, at p. 1370; *Gamez, supra*, 235 Cal.App.3d at pp. 965-966; *McDaniels, supra*, 107 Cal.App.3d at pp. 904-905.)

In sum, based upon his expertise and consideration of reliable matters, Gallivan had sufficient knowledge of the T.O.C. gang to provide jurors with expert opinion testimony helpful to reaching their decision, particularly considering the prosecution's theory that Getty's killing was a foreseeable natural and probable consequence of the target assault crime committed by gang members outside the house where a party attended by many gang members had just ended. Accordingly, because there was an adequate foundation for the basis of Gallivan's highly probative expert opinion testimony about gangs, Xayasomloth has not shown the trial court erred by admitting Gallivan's testimony over Xayasomloth's objection under Evidence Code section 801, subdivision (b).

(e)

*Gallivan's Opinion Testimony Was Within the Scope of Proper Expert Evidence*

In answering a hypothetical question based on facts paralleling this case, gang expert Gallivan testified that if a person from out of town attending a party with local gang members were knocked down and chased by those local gang members, it would be expected that other gang members would join in the pursuit that could include assaulting, detaining and beating the person from out of town who had been knocked down.

Xayasomloth contends the trial court erred by permitting Gallivan to give such testimony on the case's ultimate issue of intent and motive. Although acknowledging the rule that expert testimony may be admissible concerning the ultimate issue at trial (Evid. Code, § 805; *Killebrew, supra*, 103 Cal.App.4th at p. 651), Xayasomloth notes the appellate court in *Killebrew* indicated such rule "does not permit the expert to express any opinion [on the ultimate issue] he or she may have." (*Id.* at p. 651.) The appellate court also observed: ""Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided . . . . There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision."" (*Ibid.*)

By not objecting at trial to the hypothetical question posed to Gallivan, Xayasomloth may be deemed to have waived his right to challenge that hypothetical question on appeal. However, in any event, Xayasomloth has not shown evidentiary

error. "The use of expert testimony in the area of gang sociology and psychology is well established. [Citations.] The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.] Such evidence is admissible even though it encompasses the ultimate issue in the case." (*Olguin, supra*, 31 Cal.App.4th at pp. 1370-1371; accord, *Killebrew, supra*, 103 Cal.App.4th at p. 651.)

Case law has identified numerous gang topics for which expert testimony may be admissible, including the existence, composition, culture, habits and activities of gangs; a defendant's membership in a gang; the motivation for a particular crime; if and how a crime was committed to benefit or promote a gang; and gang rivalries. (*Killebrew, supra*, 103 Cal.App.4th at pp. 656-658.) The reason why Xayasomloth sucker punched Getty to the ground and then, after Getty got up, joined other gang members in chasing and assaulting Getty was a matter "sufficiently beyond common experience to require interpretation by one having in-depth knowledge of street gangs, thus bringing those matters within Evidence Code section 801's requirements." (*Olguin, supra*, 31 Cal.App.4th at p. 1371.) As explaining "the *expectations* of gang members in general when confronted with a specific action" (*Killebrew*, at p. 658), Gallivan's challenged response to the hypothetical question was not ""an expression of his general belief as to how the case should be decided,"" but instead constituted properly "admissible expert

opinion testimony" concerning "the ultimate issue to be decided by the trier of fact." (*Id.* at p. 651.)

Accordingly, Xayasomloth has not established any reversible judicial error with respect to the admission of gang evidence.

4

The Court Properly Declined to Instruct the Jury on Several Lesser Included Offenses

Xayasomloth contends the court reversibly erred by not instructing the jury on voluntary manslaughter, involuntary manslaughter and assault by means of force likely to produce great bodily injury as lesser offenses included in the charged crime of murder. However, Xayasomloth has not established instructional error.

After discussing jury instructions with counsel, the trial court stated it would not instruct that voluntary manslaughter and involuntary manslaughter were lesser offenses included in the murder since the state of the evidence and reasonable inferences indicated there was no basis upon which Xayasomloth could be convicted of either of those lesser offenses, an assessment with which defense counsel concurred. Defense counsel also stated that even if the jury could possibly find Xayasomloth guilty on one of those lesser included offenses, counsel as a matter of trial tactics wanted the court not to instruct on them. Over the prosecution's objection, the court stated that with respect to

Xayasomloth, it would instruct the jurors on (1) the lesser related offense of misdemeanor battery and (2) self-defense and defense of others.<sup>13</sup>

Ultimately, as to Xayasomloth, the court instructed the jury on various forms of self-defense and the lesser related offense of misdemeanor battery.<sup>14</sup> The court instructed that the target offense under the natural and probable consequences doctrine

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<sup>13</sup> The trial court determined an instruction on self-defense was warranted because the evidence was sufficient to support a finding that victim Getty was, "in fact, armed with and had in his possession at the time he was struck a rather large knife," a weapon the court described as "appallingly large" and "extremely provocative," if not "very frightening." The court also observed that witnesses' tardiness in disclosing information about that knife created a "very large inference that a lot of that evidence is manufactured to protect Getty from the conclusion that the jury might reach in this case, that he was, in fact, the aggressor at the time that [Xayasomloth] acted either in self-defense or in defense of his friend [apparently Tho], who was in a more vulnerable position, given his state of inebriation."

Given the evidence, the court's inferences were weak and, in any event, the jury rejected Xayasomloth's theory of self-defense beyond a reasonable doubt.

<sup>14</sup> Xayasomloth's counsel argued to the jury that there were two separate fights, namely, Xayasomloth's sucker punch and the subsequent group attack on Getty. Applying that defense theory of two separate fights, counsel argued that (1) Xayasomloth was involved only in the sucker punch and (2) evidence showed Xayasomloth was restrained by another departing partygoer from chasing Getty following the sucker punch and was not involved in the subsequent group attack.

Further, the defense theory of two separate fights was consistent with the instruction on self-defense as to the sucker punch. That defense theory was also consistent with the instruction on misdemeanor battery. Accordingly, defense counsel argued a guilty verdict on misdemeanor battery could be proper if in administering the sucker punch to Getty, Xayasomloth did not act in self-defense but instead simply overreacted.

The jury ultimately rejected Xayasomloth's theory of self-defense beyond a reasonable doubt. The jury also rejected Xayasomloth's theory of misdemeanor battery beyond a reasonable doubt. In doing so, the jury necessarily disbelieved the evidence supporting the defense theory of two separate fights.

was assault by means of force likely to produce great bodily injury, and also instructed on the elements of that offense. The court did not give instructions on voluntary manslaughter or involuntary manslaughter. The court acknowledged that if the evidence warranted, it would remain obligated to instruct on those lesser included offenses despite defense counsel's tactical decision not to request the instructions. However, the court determined there was no evidence to support such instructions. (*People v. Barton* (1995) 12 Cal.4th 186, 190, 197 (*Barton*).)<sup>15</sup> Later, in denying Xayasomloth's motion for new trial, the court determined that because the target crime of assault by means of force to produce great bodily injury was only a lesser *related* offense of murder, it had no sua sponte obligation to instruct the jury that such target crime was a lesser *included* offense.

"The rules governing instruction on lesser included offenses are well established." (*Prettyman, supra*, 14 Cal.4th at p. 274.) The trial court has a duty to instruct the jury on general principles of law that are closely and openly connected with the evidence and necessary to the jury's understanding of the case. (*Id.* at p. 265; *People v. Cummings*

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<sup>15</sup> The trial court must instruct the jury on a lesser included offense where there is evidence to support such claim. (*People v. Birks* (1998) 19 Cal.4th 108, 118-119 (*Birks*); *People v. Wickersham* (1982) 32 Cal.3d 307, 325 (*Wickersham*), disapproved on another ground in *Barton, supra*, 12 Cal.4th at pp. 199-201.) Even if the defendant objects, the jury must be so instructed. (*Barton*, at p. 190.)

"A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." (*Barton, supra*, 12 Cal.4th at p. 196.)

(1993) 4 Cal.4th 1233, 1311 (*Cummings*).) "California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser." (*Birks, supra*, 19 Cal.4th at p. 118.) Thus, "a trial court must, sua sponte, instruct the jury on lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged."" (*Prettyman*, at p. 274, citing *Barton, supra*, 12 Cal.4th at pp. 194-195; accord, *People v. Breverman* (1998) 19 Cal.4th 142, 148, 161-162 (*Breverman*).) As such, the court need not instruct on a lesser included offense where a defendant, if guilty at all, could only be guilty of the greater offense.<sup>16</sup> (*People v. Hawkins* (1995) 10 Cal.4th 920, 954, disapproved on another point in *People v. Lasko* (2000) 23 Cal.4th 101, 110 (*Lasko*).)

Xayasomloth contends the evidence would have permitted a trier of fact to conclude that voluntary manslaughter, involuntary manslaughter and assault by means of force likely to produce great bodily injury, rather than murder, were the reasonably

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<sup>16</sup> Where the defendant is charged as an aider and abettor, the court may have a duty to instruct on lesser included offenses even if the evidence establishes that the actual perpetrator is guilty only of the greater offense. However, such instruction would be required only if the evidence raised a question on whether the lesser included offense was a reasonably foreseeable natural and probable consequence of the target crime aided and abetted, a situation not present here. (*Prettyman, supra*, 14 Cal.4th at p. 276, citing *People v. Woods* (1992) 8 Cal.App.4th 1570, 1593 (*Woods*).)

foreseeable consequences of the group gang attack on Getty. Xayasomloth concludes the trial court was required to instruct the jury on those theories. However, the evidentiary record does not support Xayasomloth's claims of instructional error.

(a)

*Instruction on Voluntary Manslaughter as a Lesser Included Offense Was Not Required*

Voluntary manslaughter is a lesser included offense of murder. (*People v. Lewis* (2001) 25 Cal.4th 610, 645 (*Lewis*); *Barton, supra*, 12 Cal.4th at p. 199.) A homicide is voluntary manslaughter rather than murder only "if the defendant killed in a 'sudden quarrel or heat of passion' (§ 192, subd. (a); *Lasko, supra*, 23 Cal.4th at pp. 108, 110-111) or in *an unreasonable but good faith belief in the need to act in self defense*. (*People v. Blakeley* (2000) 23 Cal.4th 82, 89, 91.)" (*Robertson, supra*, 34 Cal.4th at pp. 164-165, italics added; accord, *Breverman, supra*, 19 Cal.4th at p. 163; *Barton*, at p. 199.) A homicide is deemed to result from heat of passion only if there is a provocation of such character and degree that it would cause an ordinarily reasonable person of average disposition ""to act rashly or without due deliberation and reflection, and from this passion rather than from judgment,"" a scenario not presented here. (*Breverman*, at p. 163.) "When the defendant killed in the actual but unreasonable belief that he or she was in imminent danger of death or great bodily injury, this is termed 'imperfect self-defense,' and the killing is reduced from murder to voluntary manslaughter." (*Lewis*, at p. 645;

*McCoy, supra*, 25 Cal.4th at p. 1116; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *In re Christian S.* (1994) 7 Cal.4th 768, 773, 783 (*Christian S.*).)<sup>17</sup>

Based on the theory of imperfect self-defense, Xayasomloth contends the trial court should have instructed the jury on voluntary manslaughter as a lesser offense included in the charged crime of murder, particularly because the court found sufficient evidence to instruct on the affirmative defense of self-defense and defense of others with respect to Xayasomloth. However, Xayasomloth's contention does not give proper weight to "the distinction between lesser included offenses and defenses." (*Barton, supra*, 12 Cal.4th at p. 199.) Imperfect self-defense "is a shorthand form of voluntary manslaughter" (*id.* at p. 200), while self-defense is an affirmative defense to homicide (*id.* at pp. 199-201). Hence, the mere fact that the trial court deemed the evidence to warrant instruction on the affirmative defense of self-defense did not support an instruction on the form of voluntary manslaughter based on the separate theory of imperfect self-defense. (*Ibid.*)

"Ordinarily, it is the defendant who offers evidence to show that because the killing occurred in a sudden quarrel or heat of passion, or in unreasonable self-defense,

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<sup>17</sup> "Imperfect self-defense obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*Rios, supra*, 23 Cal.4th at p. 461.) Although the doctrine of imperfect self-defense operates to negate malice and reduce murder to manslaughter (*Christian S., supra*, 7 Cal.4th at p. 773), a conviction of aiding and abetting a murder does not depend on a finding of malice but instead on a determination the individual aided and abetted the perpetrator in criminal conduct of which murder was the reasonably foreseeable result. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 90-91 (*Beardslee*).)

the crime committed is not murder, but only voluntary manslaughter. For this reason, voluntary manslaughter closely resembles an affirmative defense (placing on the defendant the burden of producing evidence of facts which, if believed by the jury, will result in the defendant's acquittal of the crime charged). Because of this similarity, a defendant's attempt to show that a killing was only voluntary manslaughter rather than murder is sometimes referred to as a 'partial defense,' a phrase that blurs the distinction between lesser included offenses and defenses." (*Barton, supra*, 12 Cal.4th at p. 199.)

"One form of voluntary manslaughter in particular, the one that is predicated on unreasonable self-defense, is quite similar to the 'defenses' referred to in [*People v. Seden* (1974) 10 Cal.3d 703, 716 (*Seden*)<sup>18</sup>]. This similarity arises partly from the use of the word 'defense' in the phrase 'unreasonable self-defense,' and partly from the close link between unreasonable self-defense and an actual defense, that is, true self-defense. The sole difference between true self-defense and 'unreasonable self-defense' is that the former applies only when the defendant acts in response to circumstances that cause the defendant to fear, and would lead *a reasonable person* to fear, the imminent infliction of death or great bodily injury (§§ 197, 198); unreasonable self-defense, on the other hand, does not require the defendant's fear to be reasonable." (*Barton, supra*, 12 Cal.4th at pp. 199-200.)

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<sup>18</sup> *Seden*, *supra*, 10 Cal.3d 703, has been disapproved on other points in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, footnote 12, and *Breverman, supra*, 19 Cal.4th at pages 149, 178, footnote 26.

Thus, "'unreasonable self-defense' is . . . not a true defense; rather it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Barton, supra*, 12 Cal.4th at pp. 200-201.) "This does not mean, however, that trial courts must instruct sua sponte on unreasonable self-defense in every murder case. Rather, the need to do so arises only when there is substantial evidence that the defendant killed in unreasonable self-defense, not when the evidence is 'minimal and insubstantial.'" (*Id.* at p. 201, fn. omitted.)

Conviction of voluntary manslaughter based on the theory of unreasonable or imperfect self-defense would require a showing that Xayasomloth killed in "an unreasonable but good faith belief in the need to act in self defense" (*Robertson, supra*, 34 Cal.4th at pp. 164-165; *Barton, supra*, 12 Cal.4th at pp. 199, 201) or otherwise "actually but unreasonably believed he was in imminent danger of death or great bodily injury" (*Christian S., supra*, 7 Cal.4th at p. 783). There was no evidence that

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Xayasomloth actually had a good faith belief he was in imminent danger of death or great bodily injury when he sucker punched Getty in the face and knocked him to the ground, and any inference of the existence of any such actual good faith belief at that time would be speculation. (*Robertson*, at pp. 164-165; *Barton*, at pp. 199, 201; *Christian S.*, at p. 783.) Indeed, undisputed evidence indicated that immediately before he was sucker punched by Xayasomloth, Getty held out his hands and departing partygoer Mony could see they were empty. Further, after Getty arose from the ground and began running away, Xayasomloth chased after him and was joined in the chase by other gang members. There was no evidence that Xayasomloth actually had a good faith belief he was in imminent danger of death or great bodily injury when he participated in chasing Getty down, and any inference of the existence of any such actual good faith belief at that time would be speculation. (*Robertson*, at pp. 164-165; *Barton*, at pp. 199, 201; *Christian S.*, at p. 783.)<sup>19</sup> Moreover, after Getty was chased down, detained, beaten and stabbed 10 times in a group attack by five to 10 gang members and lay bleeding on the ground, Xayasomloth yelled at Getty, "Get the fuck up, motherfucker, you want some more?" and "Fuck you, you got a problem, you want some more?" Considering Xayasomloth's actions of sucker punching Getty, chasing the fleeing Getty down the street, participating in a rat-pack takedown where five to 10 gang members beat and stabbed Getty 10 times,

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<sup>19</sup> Xayasomloth did not testify he actually had a good faith belief that he was in imminent danger of death or great bodily injury when he participated in chasing Getty down. Further, to argue the existence of any such belief would have contradicted the defense theory that Xayasomloth did not chase Getty after the sucker punch and was not involved in the subsequent group attack on Getty.

and then taunting and threatening the bleeding Getty as he lay moaning on the ground, no reasonable jury could find Xayasomloth actually had a good faith belief the killing of Getty was necessary to defend against imminent death or great bodily injury. (*Robertson*, at pp. 164-165; *Barton*, at pp. 199, 201; *Christian S.*, at p. 783.)

In sum, the evidence showed it was reasonably foreseeable that when Xayasomloth sucker punched Getty and chased him down, other gang members would join in the chase, eventually assault Getty and kill him. As such, the evidence indicated murder was the foreseeable natural and probable consequence of the target crime of assault by means of force likely to produce great bodily injury. The trial court's belief that the evidence warranted an instruction on the separate and distinct affirmative defense of self-defense did not compel a finding that voluntary manslaughter based on imperfect self-defense was the foreseeable and probable consequence of the target crime. (*Barton*, *supra*, 12 Cal.4th at pp. 199-201.) At most, the evidence relied upon by the court was "'minimal and insubstantial.'" (*Id.* at p. 201.) Further, as noted, Xayasomloth's counsel asked the trial court not to instruct the jury that voluntary manslaughter was a lesser offense included in murder. Thus, even if such instruction were supported by the evidence, "the doctrine of invited error would bar" Xayasomloth "from challenging on appeal the trial court's failure to give the instruction." (*Id.* at p. 198.)<sup>20</sup>

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<sup>20</sup> "The doctrine of invited error does not, however, *vindicate* the decision of a trial court to grant a defendant's request not to give an instruction that is otherwise proper: the error is still error." (*Barton*, *supra*, 12 Cal.4th at p. 198.) Here, there was no error since

Accordingly, Xayasomloth cannot demonstrate the court reversibly erred by declining to instruct the jury that voluntary manslaughter was a lesser offense included in the charged crime of murder.

(b)

*Instruction on Involuntary Manslaughter as a Lesser Included Offense Was Not Required*

"Generally, involuntary manslaughter is a lesser offense included within the offense of murder." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145 (*Gutierrez*); *Lewis, supra*, 25 Cal.4th at p. 645; *Prettyman, supra*, 14 Cal.4th at p. 274.) "Involuntary manslaughter is defined to include a killing that occurs 'in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.'" (*Lewis*, at p. 645, citing § 192, subd. (b); *Prettyman*, at p. 274.)

Xayasomloth contends the trial court should have instructed the jury on involuntary manslaughter based upon the misdemeanor-manslaughter doctrine as a lesser offense included in the charged crime of murder, particularly since the court found the evidence sufficient to instruct on the lesser related offense of battery with respect to Xayasomloth's sucker punch to Getty's head. However, there was no substantial evidence to support an instruction on involuntary manslaughter on a misdemeanor-manslaughter theory. Contrary to Xayasomloth's contention, there was no evidence that he "unwittingly and without malice set in motion a series of events" leading to Getty's death,

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as the trial court determined, there was insufficient evidence to warrant an instruction that voluntary manslaughter was a lesser offense included in the charged crime of murder.

and any inference that Xayasomloth had an unwitting nonmalicious mental state when battering Getty would be speculation. (*People v. Wilson* (1992) 3 Cal.4th 926, 942 (*Wilson*) ["Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense"].) Further, the evidence demonstrated Xayasomloth was aware his initial sucker punch to Getty's face followed by his chasing Getty would foreseeably lead to other gang members joining in the chase and subsequent gang group assault on Getty that resulted in the charged crime of murder. (*People v. Kraft* (2000) 23 Cal.4th 978, 1064 (*Kraft*).) Thus, considering the lack of evidence to support an instruction on involuntary manslaughter based on the misdemeanor-manslaughter doctrine as a lesser included offense, the trial court had no obligation to give such instruction unless the prosecution concurred with a request by the defense, a situation not presented here. (*Birks, supra*, 19 Cal.4th at pp. 112-113, 136, fn. 19.)

Moreover, as noted, Xayasomloth's counsel asked the trial court not to instruct the jury that involuntary manslaughter was a lesser offense included in murder. Thus, even if such instruction were supported by the evidence, "the doctrine of invited error" would bar Xayasomloth "from challenging on appeal the trial court's failure to give the instruction." (*Barton, supra*, 12 Cal.4th at p. 198.) Further, we need not determine whether evidence identified by Xayasomloth constitutes substantial evidence warranting instruction on involuntary manslaughter "because, even if it does, the trial court's failure to so instruct was not prejudicial. Error in failing to instruct the jury on a lesser included offense is

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harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*Lewis, supra*, 25 Cal.4th at p. 646.) By convicting Xayasomloth of second degree murder, the jury necessarily rejected the possibility that involuntary manslaughter was a natural and probable consequence of the attack. (*Ibid.*; *Gutierrez, supra*, 28 Cal.4th at p. 1145; *Prettyman, supra*, 14 Cal.4th at p. 276.) Accordingly, Xayasomloth cannot demonstrate the court reversibly erred by declining to instruct the jury that involuntary manslaughter was a lesser offense included in the charged crime of murder. (*Lewis*, at p. 646.)

(c)

*Instruction on Assault by Means of Force Likely to Produce Great Bodily Injury as a Lesser Offense Included in Murder Was Not Required*

Xayasomloth contends the trial court should have instructed the jury that assault by means of force likely to produce bodily injury was a lesser offense included in the charged crime of murder, particularly because such offense was the target crime under the prosecution's theory of second degree murder. Xayasomloth contends such instruction was compelled because the requirement that the prosecution identify the target offense when proceeding under the natural and probable consequences doctrine (*Prettyman, supra*, 14 Cal.4th at p. 254) was "parallel to the notice given in the accusatory pleadings that defines a necessarily lesser-included offense" (*Birks, supra*, 19 Cal.4th at p. 117).<sup>21</sup>

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<sup>21</sup> "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the

However, the court properly declined to instruct the jury that the target assault crime was a lesser offense included in murder because that assault offense is not a lesser *included* offense of murder but instead simply a lesser *related* offense. (*People v. St. Martin* (1970) 1 Cal.3d 524, 536 (*St. Martin*); *People v. Dixie* (1979) 98 Cal.App.3d 852, 856 (*Dixie*); *People v. Benjamin* (1975) 52 Cal.App.3d 63, 71 (*Benjamin*).) Thus, the court was only required to identify and define the target offense relied upon by the prosecution under the natural and probable consequences doctrine. (*Prettyman, supra*, 14 Cal.4th at p. 269.) Consistent with the prosecution's identification of the target offense as assault by means of force likely to produce great bodily injury, the trial court instructed the jury on the elements of that offense. Xayasomloth has not demonstrated the court was required to do more. Accordingly, Xayasomloth cannot show the court erred by not instructing the jury that assault by means of force likely to produce great bodily injury was a lesser offense included in the charged crime of murder.

In sum, Xayasomloth has not established instructional error.

5

The Trial Court Erroneously Imposed a Consecutive Term for Xayasomloth's  
Criminal Street Gang Enhancement

The trial court found Xayasomloth committed the second degree murder of Getty for the benefit of, at the direction of, or in association with a criminal street gang with the

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*accusatory pleading*, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Rios, supra*, 23 Cal.4th at p. 461, fn. 8, italics added, citing *Birks, supra*, 19 Cal.4th 108, 117.)

specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)). The trial court sentenced Xayasomloth to 30 years to life for second degree murder, and also imposed a consecutive determinate 10-year term for Xayasomloth's section 186.22 criminal street gang enhancement.

Xayasomloth contends that because an indeterminate sentence was imposed for his conviction of murder, the imposition of a consecutive determinate sentence for the criminal street gang enhancement under section 186.22, subdivision (b)(1) was erroneous. Xayasomloth contends the court should have instead imposed the alternate penalty of 15-year minimum parole eligibility as provided under section 186.22, subdivision (b)(5).

In *People v. Lopez* (Jan. 6, 2005, S119294) \_\_\_ Cal.4th \_\_\_ [2005 Cal. LEXIS 14] (*Lopez*), the Supreme Court faced the issue "whether a gang-related first degree murder, which is punishable by a term of 25 years to life, carries an additional 10-year enhancement" under section 186.22, subdivision (b)(1)(C) "or, alternatively, a 15-year minimum parole eligibility term " under section 186.22, subdivision (b)(5). (*Lopez, supra*, \_\_\_ Cal.4th \_\_\_ [2005 Cal. LEXIS 14, \*2].) The Supreme Court concluded that "first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement" under section 186.22, subdivision (b)(1)(C). (*Lopez, supra*, \_\_\_ Cal.4th \_\_\_ [2005 Cal. LEXIS 14, \*2].) Further, the Supreme Court observed that "the People have not identified anything

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to suggest the Legislature or the voters impliedly intended to exclude first or second degree murder from the ambit" of section 186.22, subdivision (b)(5). (*Lopez, supra*, \_\_\_\_ Cal.4th \_\_\_\_ [2005 Cal. LEXIS 14, \*13].)

Consistent with the Supreme Court's analysis in *Lopez, supra*, \_\_\_\_ Cal.4th \_\_\_\_ [2005 Cal. LEXIS 14], we determine the trial court erred by applying the 10-year criminal street gang enhancement term to Xayasomloth's second degree murder conviction. Accordingly, the 10-year criminal street gang enhancement term must be stricken and the abstract of judgment modified to reflect imposition of the alternative penalty of 15-year minimum parole eligibility (§ 186.22, subd. (b)(5)).

6

The Trial Court Properly Instructed the Jurors on Reasonable Doubt

Citing *United States v. Gaudin* (1995) 515 U.S. 506, 522-523 (*Gaudin*), Xayasomloth contends the trial court erred by instructing the jury with CALJIC No. 2.90, an instruction he asserts is constitutionally deficient as not telling jurors that to find him guilty, they must find each element of the charged offense of second degree murder to be established beyond a reasonable doubt.<sup>22</sup>

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<sup>22</sup> Consistent with the language of CALJIC No. 2.90, the trial court instructed the jury on reasonable doubt: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the

Although acknowledging the trial court instructed the jurors that they must find him guilty beyond a reasonable doubt and that the prosecution must prove each element of the offenses charged, Xayasomloth faults the instruction for not stating that proof beyond a reasonable doubt required proof of each material element of an offense. However, California case law has consistently rejected similar claims that CALJIC No. 2.90, the standard jury instruction on reasonable doubt, is constitutionally defective. (*People v. Ochoa* (2001) 26 Cal.4th 398, 444, fn. 13 ["It would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled that to that instruction"], citing *People v. Reed* (1952) 38 Cal.2d 423, 430; see also *People v. Osband* (1996) 13 Cal.4th 622, 679; *People v. Orchard* (1971) 17 Cal.App.3d 568, 577; *People v. Pendarvis* (1960) 178 Cal.App.2d 239, 241.) Nothing in *Gaudin*, *supra*, 515 U.S. 506, compels another conclusion. Although the decision in *Gaudin* recognized a defendant's rights to have a jury determine guilt on every element of a charged crime beyond a reasonable doubt, the decision did not require any specific language in jury instructions.

Accordingly, Xayasomloth has not demonstrated error involving the reasonable doubt instruction given to the jury.

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evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

B

*Aphayavong's Appeal*

1

Substantial Evidence Supported Aphayavong's Murder Conviction as an Aider and Abettor Under the Natural and Probable Consequences Doctrine

The prosecution pursued a second degree murder conviction against Aphayavong on the theory he aided and abetted an assault by means of force likely to result in great bodily injury, the target crime of which second degree murder was the natural and probable consequence. Aphayavong contends his conviction for second degree murder must be reversed because as a matter of law there was insufficient evidence he aided and abetted the murder of Getty. Aphayavong contends his culpability as an aider and abettor could not properly be founded on Detective Gallivan's subjective expert opinion about gang culture that purported to substitute for facts. However, for the reasons discussed with respect to Aphayavong's codefendant Xayasomloth, the trial court properly admitted Gallivan's expert opinion testimony on gang culture. (Part III.A.3, *ante*.)<sup>23</sup>

Substantial evidence supported Aphayavong's conviction for second degree murder as an aider and abettor under the natural and probable consequences doctrine. (*McCoy, supra*, 25 Cal.4th at p. 1117; *Mendoza, supra*, 18 Cal.4th at p. 1133; *Bolin, supra*, 18 Cal.4th at p. 331; *Prettyman, supra*, 14 Cal.4th at pp. 259, 260-262; *Cooper, supra*, 53 Cal.3d at p. 1164.) More specifically, evidence of Aphayavong's presence at

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<sup>23</sup> Aphayavong does not specifically raise any claim of evidentiary error.

the felony assault committed by Xayasomloth and other gang members tended to demonstrate Aphayavong was guilty of aiding and abetting the target offense of assault by means of force likely to produce great bodily injury; and Aphayavong's ""presence, companionship, *and conduct before and after the offense*"" also raised a reasonable inference that Aphayavong participated in aiding and abetting the target offense. (*People v. Gonzales, supra*, 4 Cal.App.3d at p. 600; *Moore, supra*, 120 Cal.App.2d at p. 306.)

Getty was killed outside a few minutes after the end of the December 2000 party at the home of the parents of Ham, the founder of the T.O.C. gang. Numerous members of the T.O.C. gang were at the party, including approximately 25 documented members of that gang. In 1995 when contacted by Detective Gallivan, Aphayavong said he had become a T.O.C. gang member ("jumped into T.O.C.") four years earlier. Gallivan also reviewed field interview reports about police contact with Aphayavong when he was in the company of another documented gang member. Detective Gallivan opined Aphayavong was a member of the T.O.C. gang at the time of the December 2000 party.

Contrary to Aphayavong's contention that there was no evidence he was an active gang member at the time of the December 2000 party, Gallivan's expert opinion was buttressed by other evidence showing Aphayavong was presently a member of the T.O.C. gang. Indeed, Aphayavong's attendance at the party indicated he had not removed himself from the T.O.C. gang. Further, Khamla had seen Aphayavong at T.O.C. gang social events in 1994 and 2000. Moreover, in November 2001 after his arrest for killing

Getty, Aphayavong admitted to a sheriff's deputy that he was a member of the T.O.C. gang.

During the December 2000 party, Aphayavong and his former girlfriend La were arguing and cursing at each other until La's friends separated them. Getty also stepped in to help break up the argument. Later, Tho began arguing with his ex-girlfriend because she had been flirting with Getty. When the drunk and angry Tho began throwing bottles and chairs around the backyard and challenged people to fight, Ham terminated the party and told everyone to leave. Continuing to curse and act angrily, Tho asked Getty, "What's up, you got a problem?"

As the partygoers began leaving the house, Aphayavong aggressively drove his car up and down the street, speeding, squealing his tires and revving his engine. Meanwhile, departing partygoers Getty, John, Ket and Jerry reached John's parked car across the street. When John entered his car and started the engine, Xayasomloth and Tho began walking quickly toward John's car and approached Getty. Words were exchanged. Getty held out his hands and departing partygoer Mony could see they were empty. As Getty attempted to shake Xayasomloth's hand, he was sucker punched in the face by Xayasomloth without warning and knocked to the ground.

When Getty got up and began running away, Xayasomloth and Tho started chasing him. Aphayavong stopped his car in the middle of the street, got out and joined Xayasomloth and Tho in chasing the fleeing Getty. Approximately five to 10 other people ran from the party house in pursuit of Getty.

Eventually, Getty fell. The people who had been chasing Getty then punched and kicked him repeatedly, and ultimately stabbed him to death. Partygoer John identified Aphayavong as involved in the beating. As Getty's attackers scattered, Aphayavong ran back toward the party house, got into his car parked in the street and told his girlfriend Thiep to get him napkins so he could wipe off some blood. Aphayavong then fled the scene.

Several hours after Getty was killed, Aphayavong phoned the home of Xayasomloth and Xayasomloth's girlfriend Janette. After receiving Aphayavong's call, Xayasomloth and Janette left their home and went to stay for a few days at Keila's home. Once Xayasomloth and Janette returned home, Aphayavong visited them and said that he "beat the crap" out of Getty, cut his knuckles on Getty's teeth and asked Thiep for a napkin.

Aphayavong's actus reus — (1) aggressively driving wildly up and down the street as T.O.C. gang members were leaving the December 2000 party; (2) stopping and parking his car in the middle of the street after Getty began running away following Xayasomloth's sucker punch; (3) joining Xayasomloth, Tho and other gang members in chasing Getty down; and (4) beating the "crap" out of Getty — contributed to other gang members joining the chase, the beating and the stabbing that ensued. To establish Aphayavong's culpability for Getty's murder as an aider and abettor under the natural and probable consequences doctrine, the prosecution was not required to show Aphayavong knew that an unidentified fellow gang member intended to use a knife but instead that it

was reasonably foreseeable a knife would be used to commit a crime other than his intended act of participating and assisting in the rat-pack takedown against Getty. (*Mendoza, supra*, 18 Cal.4th at pp. 1133 [the "question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable"]; *Prettyman, supra*, 14 Cal.4th at pp. 260-262; *People v. Gonzales, supra*, 87 Cal.App.4th at pp. 10-11; *Laster, supra*, 52 Cal.App.4th at p. 1465.)

Relevant to demonstrating such reasonable foreseeability was evidence that it was expected other gang members would participate in the attack and assault on victim Getty. Further, evidence that T.O.C. gang members carried and used weapons suggested it was reasonably foreseeable that one of the gang members attacking Getty would use a weapon to kill him. By his actus reus in the presence of other gang members, Aphayavong knowingly manifested his intent to commit, encourage and facilitate the identified target offense. Contrary to Aphayavong's contention that he lacked the requisite mens rea, his conviction for murder as an aider and abettor under the natural and probable consequences doctrine did not require a showing he had any intent to kill. (*McCoy, supra*, 25 Cal.4th at pp. 1116-1117; *Mendoza, supra*, 18 Cal.4th at p. 1133; *Olguin, supra*, 31 Cal.App.4th at pp. 1379-1380; *Francisco, supra*, 22 Cal.App.4th at p. 1190.)

That Aphayavong may have believed the actual perpetrator of the stabbing was assaulting Getty rather than engaging in murder would not negate Aphayavong's accomplice liability. Aphayavong's culpability for the charged crime of murder as an

aider and abettor under the natural and probable consequences doctrine was not limited to the commission of the particular act Aphayavong intended to encourage or facilitate (the target offense of assault by means of force likely to produce great bodily injury), but also extended to other reasonably foreseeable crimes actually committed by the perpetrator, namely, crimes that were natural and probable consequences of the crime Aphayavong aided and abetted. (*Prettyman, supra*, 14 Cal.4th at p. 260.) Under the circumstances, the charged murder of Getty was a natural and probable consequence of the assault facilitated and committed by Aphayavong.

That Aphayavong's actions would cause other gang members to join in the attack and kill Getty intentionally in gang fashion was reasonably foreseeable. (*Laster, supra*, 52 Cal.App.4th at p. 1465.) Evidence indicated that when a T.O.C. gang member became involved in a fight, other gang members would join in the fight even where, as here, the other side was outnumbered, with the exception that O.G.'s were not necessarily required to fight in a gang altercation. A gang member who did not back up the set by aiding his fellow gang member during a fight would be disrespected by other gang members. Gang fights were "all about winning," not about being fair. Gang members were known to carry and use weapons on occasion. Further, Aphayavong's conduct after Getty's stabbing showed Aphayavong's consciousness of guilt. (*Turner, supra*, 50 Cal.3d at p. 694, fn. 10.) Indeed, Aphayavong admitted to Xayasomloth and Janette that he had "beat the crap" out of Getty.

In sum, substantial evidence indicated that when Aphayavong joined Xayasomloth and Tho in chasing Getty in the presence of other gang members while Getty was trying to flee following Xayasomloth's sucker punch, it was reasonably foreseeable that other gang members would join in the chase and assault Getty via a rat-pack takedown that would lead to his fatal stabbing. Based on that evidence, the jury reasonably determined Getty's killing was the natural and probable consequence of Aphayavong's aiding and abetting the target crime. Accordingly, Aphayavong's conviction for second degree murder as an aider and abettor under the natural and probable consequences doctrine was amply supported by the evidentiary record.

2

The Trial Court Properly Declined to Instruct the Jury on Voluntary Manslaughter as a Lesser Offense Included in Murder

Asserting substantial evidence showed the natural and probable consequences of his conduct was voluntary manslaughter, Aphayavong contends his murder conviction should be reversed because the trial court declined to instruct the jury that voluntary manslaughter was a lesser offense included in the charged crime of murder. (*Woods, supra*, 8 Cal.App.4th at pp. 1582-1592.)<sup>24</sup> However, the evidentiary record does not support Aphayavong's claim of instructional error.

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<sup>24</sup> In *Woods, supra*, 8 Cal.App.4th 1570, the appellate court stated that "in determining aiding aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a

As discussed, the "rules governing instruction on lesser included offenses are well established." (*Prettyman, supra*, 14 Cal.4th at p. 274.) Thus, "a trial court must, sua sponte, instruct the jury on lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged."" (*Ibid.*; *Cummings, supra*, 4 Cal.4th at p. 1311.)

Based on the theory of imperfect self-defense (*McCoy, supra*, 25 Cal.4th at p. 1116; *Lewis, supra*, 25 Cal.4th at p. 645; *Rios, supra*, 23 Cal.4th at p. 460; *People v. Blakeley, supra*, 23 Cal.4th at pp. 87-88; *Christian S., supra*, 7 Cal.4th at pp. 773, 783), Aphayavong contends the trial court had a sua sponte duty to instruct on voluntary manslaughter as a lesser included offense of murder, particularly because the court found sufficient evidence to instruct on the affirmative defense of self-defense with respect to Aphayavong's codefendant Xayasomloth. Aphayavong contends that if Getty had a knife during his initial encounter with Xayasomloth and Tho, Getty very likely had the knife while he was running away from Xayasomloth's sucker punch or where the killing occurred. Aphayavong concludes the perpetrator who actually stabbed Getty may have believed Getty was carrying a very large knife and was going to stab or seriously hurt the perpetrator, thus implicating the theory of imperfect self-defense. However, the facts did

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consequence. Otherwise, . . . the jury would be given an unwarranted, all-or-nothing choice for aider and abettor liability." (*Id.* at p. 1588.)

not support an instruction on voluntary manslaughter. (*Breverman, supra*, 19 Cal.4th at pp. 161-162; *Christian S.*, at pp. 773, 783.)

Under Aphayavong's theory, his conviction for voluntary manslaughter based on unreasonable or imperfect self-defense would require a showing that the perpetrator who stabbed Getty acted in "an unreasonable but good faith belief in the need to act in self defense" (*Robertson, supra*, 34 Cal.4th at pp. 164-165; *Barton, supra*, 12 Cal.4th at pp. 199, 201) or otherwise "*actually* but unreasonably believed he was in *imminent* danger of death or great bodily injury" (*Christian S., supra*, 7 Cal.4th at p. 783, italics added). However, there was no evidence to support Aphayavong's theory that the perpetrator actually had a good faith belief that he (the perpetrator) was in imminent danger of death or great bodily injury when Xayasomloth sucker punched Getty, when Xayasomloth joined in the chase of Getty in the presence of other gang members, or when Getty was fatally stabbed. Further, an inference of the existence of any such actual good faith belief at any of those times would be speculation. (*Robertson*, at pp. 164-165; *Barton*, at pp. 199, 201; *Christian S.*, at p. 783.) Such speculation is an insufficient basis upon which to require the trial judge to give a lesser included offense instruction. (*Wilson, supra*, 3 Cal.4th at p. 942.)

As discussed, the evidence showed it was reasonably foreseeable that when Aphayavong joined Xayasomloth and Tho in chasing Getty down while he was trying to flee, other gang members would join in the chase, eventually assault Getty and kill him. As such, the evidence indicated murder was the foreseeable natural and probable

consequence of the target assault crime aided and abetted by Aphayavong. The trial court's belief that evidence warranted an instruction as to his codefendant Xayasomloth on the separate and distinct affirmative defense of self-defense did not compel a finding that voluntary manslaughter based on the theory of imperfect self-defense was the foreseeable and probable consequence of the target crime. (*Barton, supra*, 12 Cal.4th at pp. 199-201.) The evidence relied upon by the court was "'minimal and insubstantial'" at most. (*Id.* at p. 201.) Further, as noted, Aphayavong's counsel asked the trial court not to instruct the jury that voluntary manslaughter was a lesser offense included in murder. Thus, even if such instruction were supported by the evidence, "the doctrine of invited error" would bar Aphayavong "from challenging on appeal the trial court's failure to give the instruction." (*Id.* at p. 198.) Accordingly, Aphayavong cannot demonstrate the court reversibly erred by declining to instruct the jury that voluntary manslaughter was a lesser offense included in murder.<sup>25</sup>

### 3

#### Whether Aphayavong's Trial Counsel Rendered Ineffective Assistance Cannot Be Determined on This Record

Aphayavong contends his trial counsel rendered ineffective assistance by not requesting jury instructions that voluntary manslaughter and assault by means of force

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<sup>25</sup> Without citation to the record, Aphayavong contends the evidence that purportedly supported a finding of imperfect self-defense would also support a finding that the perpetrator who stabbed Getty acted without malice, a contention that is no more than speculation. Further, as discussed, conviction of aiding and abetting a murder does not depend on a finding of malice but instead on a determination the individual aided and

likely to produce great bodily injury were lesser offenses of the charged crime of murder. However, on this record Aphayavong has not demonstrated ineffective assistance of trial counsel.

After discussing jury instructions with counsel, the trial court stated it would not instruct that voluntary manslaughter was a lesser offense included in the charged crime of murder since the state of the evidence and reasonable inferences indicated there was no basis upon which Aphayavong could be convicted on that lesser offense, an assessment with which defense counsel concurred. Defense counsel also stated that even if the jury could possibly find Aphayavong guilty on voluntary manslaughter as a lesser included offense, counsel as a matter of trial tactics wanted the court not to instruct on that offense.

At trial, the court did not instruct the jury that voluntary manslaughter was a lesser offense included in murder. The court acknowledged that if the evidence warranted, it would remain obligated to instruct on voluntary manslaughter despite defense counsel's decision not to request that instruction. However, the court determined there was no evidence to support such instruction. (*Barton, supra*, 12 Cal.4th at pp. 190, 197.) Later, in denying Aphayavong's motion for new trial, the court determined that because the target crime of assault by means of force likely to produce great bodily injury was only a lesser *related* offense of murder, it had no sua sponte obligation to instruct the jury that such target assault crime was a lesser *included* offense.

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abetted the perpetrator in criminal conduct of which murder was the reasonably foreseeable result. (*Beardslee, supra*, 53 Cal.3d at pp. 90-91.)

Aphayavong has the burden to prove his trial counsel rendered inadequate assistance. (*People v. Pope* (1979) 23 Cal.3d 412, 425, disapproved on another point in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) To establish ineffectiveness of counsel, Aphayavong "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms [citation], and that a reasonable probability exists that, but for counsel's unprofessional errors, the result would have been different." (*People v. Farnam* (2002) 28 Cal.4th 107, 148 (*Farnam*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Aphayavong has not made that showing.

Where ""the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 (*Mendoza Tello*), citing *Wilson, supra*, 3 Cal.4th at p. 936.) "[B]ecause, in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding, in which the attorney has the opportunity to explain the reasons for his or her conduct. 'Having afforded the trial attorney an opportunity to explain, courts are in a position to

intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence.'" (*Wilson*, at p. 936.)

Aphayavong contends that on this appeal we may properly entertain his claim of ineffective assistance because there was no reasonable or tactical purpose for his trial counsel's forgoing a jury instruction that voluntary manslaughter based on imperfect self-defense was a lesser offense included in the charged crime of murder. (*Wilson, supra*, 3 Cal.4th at p. 936.) Aphayavong also contends his trial counsel should have requested an instruction that assault by means of force likely to produce great bodily injury was a lesser offense of murder because Getty's killing was assertedly "a chance encounter rather than a planned attack, permitting a strong inference that the outcome of the incident was only a beating, and the stabbing was not a reasonably foreseeable consequence of the fight."

However, as noted, the trial court stated that — despite Aphayavong's trial counsel's decision not to request a jury instruction on voluntary manslaughter as a lesser offense included in the charged crime of murder — the court would have remained obligated to give such instruction had the evidence warranted. The court determined there was no such evidence to support the instruction. (*Barton, supra*, 12 Cal.4th at pp. 190, 197.) We agree and determine the trial court properly declined to instruct the jury on voluntary manslaughter as a lesser included offense of murder because the evidence did not support such instruction. (Part III.B.2, *ante*.) As such, Aphayavong could not demonstrate the trial court reversibly erred by declining to instruct the jury on voluntary

manslaughter as a lesser offense included in murder. Hence, Aphayavong's trial counsel was not ineffective by declining to request an instruction that lacked evidentiary support and would have been properly rejected. (*Farnam, supra*, 28 Cal.4th at p. 148.)

As Aphayavong properly acknowledges, the trial court correctly concluded the target crime of assault by means of force likely to produce great bodily injury was not a lesser *included* offense of murder, but simply a lesser *related* offense. (*St. Martin, supra*, 1 Cal.3d at p. 536; *Dixie, supra*, 98 Cal.App.3d at p. 856; *Benjamin, supra*, 52 Cal.App.3d at p. 71.) As such, the trial court had no obligation to instruct the jury that such assault crime was an uncharged lesser *related* offense unless the prosecution concurred with a defense request, a situation not presented here. (*Kraft, supra*, 23 Cal.4th at p. 1064; *Birks, supra*, 19 Cal.4th at pp. 112-113, 136, fn. 19.) Nonetheless, Aphayavong contends there "could be no satisfactory explanation" for his trial counsel's failure to request a jury instruction that the target assault crime was a lesser related offense of the charged crime of murder. (*Mendoza Tello, supra*, 15 Cal.4th at p. 266; *Wilson, supra*, 3 Cal.4th at p. 936.) Further, asserting he was guilty of the target assault crime because substantial direct evidence showed Getty's killing was a chance encounter rather than a planned attack, Aphayavong concludes we may properly entertain his claim his trial counsel rendered ineffective assistance by not requesting an instruction that such assault crime was a lesser related offense of murder. (*Wilson*, at p. 936.)

In support of his contentions, Aphayavong cites jurisprudence arising in the context of lesser included offenses. (*People v. Webster* (1991) 54 Cal.3d 411, 444, fn. 17

(*Webster*); *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352; *Wickersham, supra*, 32 Cal.3d at p. 324; *Sedeno, supra*, 10 Cal.3d at p. 716; *St. Martin, supra*, 1 Cal.3d at p. 533; *Woods, supra*, 8 Cal.App.4th at p. 1589.)<sup>26</sup> In essence, by holding that trial courts are obligated to instruct on a lesser included offense even if the defense for tactical reasons wants no such instruction, the cited case law has cautioned against gamesmanship involving jury instructions on lesser included offenses. However, the rationale of those cases does not apply to impose a sua sponte obligation on the trial court to instruct on lesser related offenses.

Nevertheless, the trial court may sometimes properly instruct on a lesser related offense, specifically, with the prosecution's concurrence when requested by the defense. (*Kraft, supra*, 23 Cal.4th at p. 1064; *Birks, supra*, 19 Cal.4th at pp. 112-113, 136, fn. 19.) Here, however, Aphayavong's trial counsel inexplicably made no request for a jury instruction that assault by means of force likely to produce great bodily injury was a lesser related offense of murder. Nothing in the record reveals why Aphayavong's trial counsel decided not to request such instruction. (*Mendoza Tello, supra*, 15 Cal.4th at p. 266.) Because on this record we are unable to determine whether Aphayavong's trial

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<sup>26</sup> In *Webster, supra*, 54 Cal.3d 411, the Supreme Court observed: "We have admonished that the jury should not be confronted with an 'all or nothing' choice when it believes that the accused is guilty only of a lesser included offense. If given no opportunity to convict of the lesser offense, we reasoned, the jury may wrongly convict of the greater offense, even though it believes an element of that offense is missing, rather than acquit the defendant entirely." (*Id.* at p. 444, fn. 17.)

In *Woods, supra*, 8 Cal.App.4th at page 1589, the appellate court stated "'the People have no legitimate interest in obtaining a conviction on a greater offense than that

counsel's decision not to request an instruction that such assault crime was a lesser related offense of murder came within the range of reasonable competence, Aphayavong's claim of ineffective assistance must be rejected on this appeal. (*Ibid.*; *Wilson, supra*, 3 Cal.4th at p. 936.) Such claim is more appropriately decided in a habeas corpus proceeding. (*Mendoza Tello*, at pp. 266-267; *Wilson*, at p. 936.) Accordingly, with respect to the lack of request for an instruction on the target assault crime as a lesser related offense of the charged crime of murder, our denial of Aphayavong's claim of ineffective assistance is made without prejudice to his right to seek habeas corpus.<sup>27</sup>

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established by the evidence, [and] a defendant has no right to an acquittal when the evidence is sufficient to establish a lesser included offense."

<sup>27</sup> At oral argument, Aphayavong's appellate counsel contended trial counsel rendered ineffective assistance by presenting defense witness Johnny Sengsourinthone (Johnny) without adequately investigating Johnny's story. After Johnny testified at trial that he was at the December 2000 party and saw Aphayavong stop T.O.C. gang member Danny Le from shooting Getty, the prosecutor presented evidence that Johnny was incarcerated at the time of the party. The prosecutor argued that Johnny fabricated his testimony to assist fellow T.O.C. gang member Aphayavong and that such testimony should be used to show Aphayavong's consciousness of guilt. However, on this record we cannot determine why Aphayavong's trial counsel did not know that Johnny was incarcerated at the time of the December 2002 party. Because we are unable to determine whether trial counsel's failure to discover Johnny's incarceration was within the range of reasonable competence, Aphayavong's claim of ineffective assistance must be rejected on this appeal. (*Mendoza Tello, supra*, 15 Cal.4th at pp. 266; *Wilson, supra*, 3 Cal.4th at p. 936.) Such claim is more appropriately decided in a habeas corpus proceeding. (*Mendoza Tello*, at pp. 266-267; *Wilson*, at p. 936.) Accordingly, with respect to Aphayavong's trial counsel's failure to make an adequate pretrial investigation of Johnny's story, our denial of Aphayavong's claim of ineffective assistance is made without prejudice to his right to seek habeas corpus.

The Trial Court Erred in Imposing a Consecutive Term for Aphayavong's  
Criminal Street Gang Enhancement

The trial court found Aphayavong committed the second degree murder of Getty for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).) The court sentenced Aphayavong to 30 years to life for murder, and also imposed a consecutive determinate 10-year term on Aphayavong for his criminal street gang enhancement. Further, the court imposed an additional 5-year term for Aphayavong's prior serious felony conviction.

Aphayavong contends the trial court erred in imposing a 10-year consecutive criminal street gang enhancement term under section 186.22, subdivision (b)(1)(C) instead of the alternate criminal street gang penalty of 15-year minimum parole eligibility under section 186.22, subdivision(b)(5). For the reasons discussed with respect to Aphayavong's codefendant Xayasomloth (part III.A.5, *ante*), we agree with Aphayavong. (*Lopez, supra*, \_\_\_ Cal.4th \_\_\_ [2005 Cal. LEXIS 14].)

Thus, consistent with the Supreme Court's analysis in *Lopez, supra*, \_\_\_ Cal.4th \_\_\_ [2005 Cal. LEXIS 14], we determine the trial court erred by applying the 10-year criminal street gang enhancement term to Aphayavong's second degree murder conviction. Accordingly, the 10-year criminal street gang enhancement term must be stricken and the abstract of judgment modified to reflect imposition of the alternative penalty of 15-year minimum parole eligibility (§ 186.22, subd. (b)(5)).

#### IV

#### DISPOSITION

The 10-year consecutive determinative term imposed against each defendant for a criminal street gang enhancement under Penal Code section 186.22 is reversed and ordered stricken. The superior court is directed to amend each abstract of judgment to reflect (1) the striking of the 10-year criminal street gang enhancement term and (2) the imposition of the alternate penalty of 15-year minimum parole eligibility of Penal Code section 186.22, subdivision (b)(5). The superior court is further directed to forward the amended abstracts of judgment to the Department of Corrections. The remainder of each judgment is affirmed.

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IRION, J.

WE CONCUR:

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HALLER, Acting P. J.

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AARON, J.